ed States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,393

GREAT FALLS COMMUNITY TV CABLE CO., INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Respondents,

HARRISCOPE BROADCASTING CORPORATION,
SNYDER & ASSOCIATES,
TELEPROMPTER TRANSMISSION OF KANSAS, INC.,
Intervenors.

On Petition for Review of An Order of the
Federal Communications Commission

BRIEF FOR PETITIONER

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JURISDICTIONAL STATEMENT

This is a petition for review of a memorandum opinion and order of the Federal Communications Commission (10 F.C.C.2d 656,R. pp. 60-84), released November 17, 1967.

ordering petitioner and other parties to comply with Sections 21.712 and 74.1103 of the Commission's Rules, 47 C.F.R. 21.712, 74.1103. The petition for review was filed under Section 402(a) of the Communications Act of 1934, as amended, 66 Stat. 718 (1952), 47 U.S.C. 402(a), and Sections 2 and 3 of the Judicial Review Act, 64 Stat. 1129, 1130 (1950), 28 U.S.C. 2342 and 2343.

STATEMENT OF THE CASE

This review broadly challenges the jurisdiction of the Federal Communications Commission to regulate community antenna systems (CATV), whether operated from "off-the-air" reception or through common-carrier microwave service. Specifically, the review is directed to the validity of the "non-duplication" rule as contained in Sections 21.712 and 74.1103 and petitioner's forced compliance with these rules. Before examining the facts of the case a brief background and explanation of CATV operation and its treatment by the Federal Communications Commission is in order.

1. History of CATV

The FCC has defined a CATV system "as a facility which receives and amplifies the signals broadcast by one or more television stations and redistributes such signals by wire or cable to the homes or places of business of subscribing members of the public for a fee." *First Report and Order*, 38 F.C.C.

683, 684, N. 1 (1965).[1] Ordinary television transmission is geographically limited to line of sight, usually about 70 miles due to the earth's curvature. CATV can overcome terrain barriers and extend the limited range by erecting a high antenna tower within the line of sight transmission and by piping the signals received through connecting cable lines. Still further extension of television signals can be made by using microwave transmission: that is receiving the signals within the broadcast range and by beaming them along a point-to-point radio air-wave and then through the connecting cable at the viewing location.

CATV systems selling this service since 1950 are nearly as old as commercial television. The systems first brought signals to areas which had no television, either because they lay behind a mountainous shield or were too remote to available television broadcasting. Advances in technology enabling multiple signal transmission along the same cable, broadened CATV service to include bringing other network programming to areas with only one station. Current industry development permits carrying 40 signals on the same cable, much more than are available off the air, and has brought CATV service into major metropolitan areas, offering quality reception free of interference and closed circuit programming originated by the system.

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[1] This Court has dealt with CATV Issues in *Southwestern Cable Co. v. United States*, 378 F. 2d 118 (9th Cir., 1967), *cert. granted*, 389 U.S. 911 (1967); *Cable Vision, Inc. v. KUTV, Inc.*, 335 F. 2d 348 (9th Cir., 1964), *cert. denied*, 379 U.S. 989 (1965). Presently pending before the Court is *Total Telecable, Inc. v. Federal Communications Commission*, No. 21990, submitted November 10, 1967, but held in abeyance pending the outcome of *Southwestern, supra*.

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2. CATV Regulations

Federal regulation of CATV is a recent reversal of the Commission's repeated disclaimer of any jurisdiction over CATV systems. Initially and dating from the early 1950's, Commission action affecting CATV concerned the grant of radio licenses to construct and operate common carrier microwave radio stations serving CATV systems. This licensing conformed to traditional common carrier approvals, reviewing rates and discriminatory practices. Under the Commission's common carrier licensing, microwave CATV systems sprang up all over the country enabling every area to have television reception.

In 1956, the Commission issued rules regarding the limits of cable radiation of energy by CATV systems. This action was consistent with the Commission's practice of protecting radio and television signals from interruption by electrical interference. In 1959, after a two-year investigation of "auxiliary" services of television broadcasting, the Commission issued a report and order holding that it did not have jurisdiction under the Communications Act of 1934 to regulate CATV systems, whether the systems were off-the-air or microwave fed and that economic protection of broadcasting was an "absurdity" *CATV and TV Repeater Services,* 26 F.C.C.403, 429, 431-432 (1959).[2]

After this disclaimer of jurisdiction over CATV, the Commission requested Congress to pass certain remedial legislation conferring limited jursidiction over CATV. The proposed legislation contained in S. 2653, 86th Cong., 1st Sess. (1959) was

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[2] Parts of this ruling relating to Commission jurisdiction over CATV are set forth in Appendix A, pp. 1a-9a.

defeated after long and bitter debate by a vote to recommit the bill. A second attempt by the Commission in 1961 to gain jurisdiction over CATV died in committee. A 1966 bill to confer jurisdiction over CATV also failed.[3]

Following these unsuccessful attempts to obtain Congressional grant of jurisdiction, the Commission assumed jurisdiction and issued its *First Report and Order,* 38 F.C.C. 683 (1965), requiring *microwave*-CATV systems, upon request, to carry the signals of all local and nearby television stations and to refrain from duplicating the programs broadcast by the local stations. The adoption of these rules was based on the conclusions that CATV competition is unfair and action is needed to ameliorate the adverse affects of this competition for the maintenance and healthy growth of television broadcast service (38 F.C.C. at 713). In short, the regulations were designed to provide economic protection to licensee broadcasters, by restraining the business conduct of non-licensee CATV systems.

A year later the Commission issued its *Second Report and Order,* 2 F.C.C.2d 725 (1966), applicable to *all* CATV systems and providing for local carriage and non-duplication. Two Commissioners dissented from the promulgation of these rules adhering to the prior decision that the Commission had no statutory authority or jurisdiction over CATV, 2 F.C.C.2d at 808 and 819.[4]

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[3] A legislative history of the Commission's unsuccessful attempts to gain jurisdiction is contained in Appendix B, p. 37a.

[4] These dissents are quoted in full in Appendix A, pp. 24a and 26a. See also Loevinger dissents in same proceedings, Appendix A at pp. 10a and 27a.

3. CATV in Great Falls, Montana

The Great Falls Community TV Cable Company, Inc., was established in 1961. It carries eight television signals—two local signals and eight imported. In addition, it originates and carries a time and weather station. Of the imported signals, three are from Spokane, Washington (KREM, KXLY, and KHQ), one from Lethbridge, Canada (CJLH), and two from Salt Lake City, Utah (KUED and KCPX). The three stations from Spokane, and the one from Canada are received by common carrier microwave of TelePrompTer Transmission of Kansas, Inc., and the two from Salt Lake City by microwave of Western Microwave, Inc. Local stations are received off-the-air by ordinary CATV antenna. (R. p. 4).

The Great Falls system has grown slowly and unprofitably. It began in December of 1961 and by the end of 1962 had 800 subscribers. At the end of 1963, it had only 1100 subscribers; and by 1964, 2400; by 1965, 3100; by 1966, 4100; and at present, 5069 subscribers. (R. p. 19) During its six year period of operation, the CATV system has spent approximately $10,000 a year in advertising and promotion. More than $820,000 is invested in plant with a present value of $525,000. (Symons affidavit attached to Motion for Stay, para. 6). To date, the system has not produced a net profit in any year of operation. However, net losses are down from a high of $97,000 in 1964 to a low of $12,000 for the past year. With its current subscription and a projection of future subscribers in its potential market, the system expects to produce a net profit in the immediate years of operation and realize a steady return on the substantial investment. (R. p. 20).

Great Falls has two local television stations, KFBB-TV, founded in 1954, and KRTV, founded in 1958. Both are

affiliated with national networks, KFBB-TV with CBS and ABC, and KRTV with NBC and ABC. Thus, citizens of Great Falls have available by off-the-air reception a substantial majority of network television programming. The principal service or marketable feature offered by the CATV system in Great Falls is a broader selection of competing network television shows only available off-the-air at the same time. Since approximately 80 percent of the imported television signals carried by the CATV come from an earlier western time zone, the local viewer can enjoy competing programs offered only simultaneously by local television, but available at other times by the CATV carriage. (R. p. 40-41).

Enforcement of the non-duplication order will eliminate about 60 percent of the service of the system and destroy its unique, marketable feature. Non-duplication will result in almost certain destruction of CATV in Great Falls and deprive subscribers of their preferred free selection. (R. pp. 40,42).

4. The Proceedings before the FCC

Petitioner, Great Falls Community TV Cable Co., Inc., is not a licensee or applicant for license before the FCC. The FCC does not purport to "license" the conduct of a CATV business. However, petitioner's affiliate and intervenor here, TelePrompTer Transmission of Kansas. Inc., is a licensee of several common carrier microwave stations used in importing the Canadian and the three Spokane signals to Great Falls. Permission to build and operate these systems was licensed in 1961 and was not then subject to any restrictive conditions affecting carriage by the CATV customer.

On September 15, 1965, TelePrompTer Transmission of Kansas, Inc., filed an application with the FCC for

modification of its licenses of stations servicing Great Falls CATV to add FM radio signals and for waiver of the newly promulgated non-duplication rules. These rules provide that no additional service would be approved for existing microwave licensees without promise of non-duplication of local television. The proposed service by TelePrompTer was not for television carriage but was an extension of FM radio programming to Great Falls, Montana.

On March 8, 1966, the Commission further extended its jurisdiction over all CATV systems (whether using microwave or not) and similarly required non-duplication by CATV systems. *Second Report and Order*, 2 F.C.C. 2d 725 (1966). On April 18, 1966, TelePrompTer Transmission of Kansas, Inc., was joined by its affiliate in the proceeding, Great Falls Community TV Cable Co., Inc., which requested partial waiver of the non-duplication rule, 74.1103.[5] The local stations opposed the waiver applications.

By Memorandum and Order of November 17, 1967, and combined with various other petitions pending in the same Montana area and involving similar issues, the Commission denied the application for modification of licenses and the waiver of the non-duplication rules. In addition, the Commission issued a proscriptive order requiring petitioner to provide non-duplication protection under the Rules to the local stations within thirty days from the issuance of the order. It is this order that is here on review. By order of January 10, 1968, this Court stayed the Commission Order insofar as it affects

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[5] Petitioner had advised both the FCC and the two Great Falls TV stations that it would agree voluntarily to protect all of the programs broadcast by the two local stations for *simultaneous* duplication by programs received on the cable from the more-distant stations (R. p. 4).

petitioner's operation pending final hearing and determination of the petition for review.

SPECIFICATION OF ERRORS

1. The Commission erred in stretching its jurisdiction over non-licensee CATV systems through its recognized regulatory jurisdiction over common carrier microwave radio.

2. The Commission erred in confusing its protection of the public interest to free access and equality of rates in the use of common carrier service with its public interest considerations in the allocations of radio frequencies.

3. The Commission erred in usurping jurisdiction over CATV systems, contrary to its controlling statute and in conflict with its prior administrative rulings.

4. The Commission erred in promulgating non-duplication rules restricting the reception and distribution of information as a prior restraint in the exercise of free speech in violation of the First Amendment.

5. The Commission erred in the issuance of a summary order without hearing against a non-licensee threatening total destruction of its six-year business as a taking of property in violation of the due process clause of the Fifth Amendment.

6. The Commission erred in promulgating regulations which are unreasonable and arbitrary in discriminating against legitimate CATV competition and in delegating enforcement power of the regulations to the favored competitor broadcaster.

I.

The FCC Cannot Extend Its Jurisdiction Over Non-Licensee CATV Systems through Its Recognized Regulatory Jurisdiction Over Common Carrier Microwave Radio

The Commission maintains that it has statutory authority to impose restrictive regulations upon CATV systems through its ordinary licensing power over the common carrier microwave radio licensee, irrespective of its doubtful direct jurisdiction over CATV systems.[6] Petitioner maintains that the issue of jurisdiction over CATV is independent of the means of delivery of the signals, whether off-the-air or microwave fed. The Commission cannot impose regulation upon the CATV system through the guise of licensing of the microwave carrier, while requiring all affirmative obligations and performance by the CATV system itself. In Part I we discuss the identity of legal position between CATV systems, receiving signals either by microwave or off-the-air reception, whereas in Part II, we examine the statutory limits of the jurisdiction of the FCC to regulate any CATV. Also discussed in Part I, Section B, is the right of the user of common carrier service to receive materials without limitation or restriction, and that the protected

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[6] The Commission's general jurisdiction to regulate directly *non-microwave CATV systems* is now under review by this Court in *Total Telecable, Inc. v. Federal Communications Commission*, No. 21990, submitted on November 10, 1967, but held in abeyance pending the outcome of the review of this Court's decision in *Southwestern Cable Co. v. United States*, 378 F. 2d 118, (9th Cir., 1967), *cert. granted* 389 U.S. 911 (1967). *Southwestern*, while also raising the issue of Commission jurisdiction over non-microwave CATV, involves principally CATV rule 74.1109 and the right of the Commission to issue proscriptive orders, giving temporary relief prior to supporting findings in an adjudicatory hearing.

public interest in common carrier regulation is free access and non-discrimination in the use of common carrier service.

A. The Commission Lacks Jurisdiction over CATV Systems Irrespective of Whether the Signals Are Received Off-the-Air or by Microwave.

The *First Report and Order (CATV),* 38 FCC 683 (1965) asserts microwave CATV regulatory authority and issues rules for its conduct. Basic to these rules is Section 21.712, providing for CATV non-duplication protection of local stations by microwave-fed CATV systems. The *Second Report and Order (CATV),* 2 FCC 2d 725 (1966), issued a year later, promulgated rules applicable to *all* CATV systems, whether using microwave service or not, 47 C.F.R. 74.1101 *et seq.* This second set of rules also contains a non-duplication rule, 74.1103, which embraces, but enlarges the requirements of 21.712.

Section 21.712, while initially addressed to the microwave carrier, operates only against the CATV system. Subparagraph (a) of Section 21.712 instructs the microwave carrier to require certification of compliance from its CATV customer. The remaining parts of 21.712, (b) through (i), apply directly to the CATV system. These subparagraphs contain the carriage and non-duplication rules, identical to those directed against the CATV system in Section 74.1103. Thus, under 21.712, the Commission makes the microwave carrier merely a conduit of regulatory power and requires compliance, not by the carrier, but by the customer user.

Indeed, the Commission's rules in 21.712(j) provide that any dispute or complaint by the broadcaster concerning compliance with the non-duplication rule by the CATV system does not impose a duty upon the microwave carrier, but is to

be settled by the Commission itself. In the instant case subsequent to filing the petition for review in this Court and subsequent to this Court's order staying the effects of the Commission Memorandum and Opinion, intervenor broadcasters applied to the Commission for an order compelling enforcement of non-duplication by the microwave carriers. By order released February 14, 1968, the Commission quite properly dismissed the motion in compliance with this Court's order and explained the role of the microwave carrier:

> This provision [Section 21.712(j)] was added to the rules to clarify the Commission's policy that the common carrier's role in the case of disputes is a *passive* one; that it does not have the burden of interpreting, applying and enforcing the carriage and non-duplication provisions of the Rules; and that it is not liable under Section 206 of the Communications Act where a CATV-TV dispute arises. [Emphasis added] (*Western Microwave Inc.*, FCC 68-110, 1153 released February 14, 1968, pp. 4, 5.)

Admittedly then, the microwave carrier stands only as a dumb, passive, jurisdictional fiction to reach the non-licensee CATV operator, in whom rest all the burdens, duties, and liabilities for compliance.

In practical operation, it is the CATV system which must take the affirmative action to comply with these rules, since mechanically the non-duplication is achieved at the "head-end" of the CATV system; that is, the microwave carrier pipes in the same program material, but the CATV system through the use of auxiliary equipment itself blacks out or eliminates the proscribed "duplicating" program before sending the signals through its cable connections.

Thus, Rule 21.712, which ostensibly is addressed to the license carrier, imposes no restrictions upon the material transmitted over the carrier circuit. Indeed, the FCC has no interest in the volume or nature of program transmission by the jurisdictional carrier. Rather, the express intent of Rule 21.712 is to prescribe the use which the carrier's customer may make of the programs delivered to it over the carrier circuit, and for which the customer pays full transmission charges.

Petitioner does not dispute the jurisdiction of the FCC to license and regulate common carrier microwave stations. Indeed, regulation as to tariffs and radio transmission are essential elements of the FCC's function in protection of the public interest as well as the customer served. Petitioner *does* challenge the right and jurisdiction of the FCC to reach the CATV system, over which it has no jurisdiction, by the device or ruse of regulating the microwave carrier, over which it has only ordinary common carrier licensing power and regulatory control. The Commission cannot do by indirection what it cannot do by direction.

The broad implication of such an extension of jurisdiction is to reach and regulate all customers using common carrier service. In his dissent to the *First Report and Order,* Commissioner Loevinger observed:

> The most important and fundamental legal objection to the present Commission action is its lack of adequate jurisdictional basis. The rule promulgated by the Commission at this time undertakes to regulate the programs that may be carried by CATV's by requiring common carriers that serve the CATV's to impose upon their customers, as a condition of service, the limitations contained

> in the Commission rules. The Commission has repeatedly rejected this basis of jurisdiction in the past, as appears from the cases cited and quoted below. But regardless of lack of support in precedent or statutory language, the logical implications of this approach should warn of its unsoundness. If the Commission can impose its will on a person or business entity, that is the customer of a common carrier, by the simple device of requiring the common carrier to act as the Commission's policeman in order to keep its license, then the Commission can regulate any business in the United States. Every business and most citizens are customers of the telephone and telegraph companies. It has never previously been suggested that this fact subjected them to regulation by the FCC. But if today's decision stands, then that is the law. The Commission need no longer be constrained by any technical limitations on its jurisdiction arising from statutes enacted by Congress, if this theory is sustained by the courts. The rule adopted by the Commission today applies to CATV's served by the telephone company as well as to those served by CATV relay companies. But there is nothing in the logic of the Commission's jurisdictional approach that limits this technique to CATV's. If this jurisdictional foundation is sound for CATV's, the Commission may, by precisely the same technique, impose its regulations on theaters or newspapers, on stockbrokers or taxicabs, indeed on any business or person that needs and uses the services of a communications common carrier. (38 FCC 752)

As Commissioner Loevinger reasons, the logical implication of the Commission's action in reaching the customer through its

legitimate jurisdiction over the microwave carrier is to extend regulatory jurisdiction and control over almost every facet of American business by controlling the flow of information and material.

The Commission itself has previously refrained from such a device in extending its jurisdiction over the major networks. Like CATV, the major networks use microwave service to transmit packaged programs. As the principal supplier of program materials, networks naturally affect the Commission's national allocation scheme– the principal argument advanced for asserting jurisdiction over CATV. A denial or grant of a network contract for affiliation may mean life or death of a local station. This has been particularly true in UHF station operation.[7] Despite this heavy impact of network activity on broadcasting, which is the asserted basis for jurisdiction over CATV, the Commission has repeatedly and explicitly disallowed authority over the networks. In *Don Lee Broadcasting System*, 14 F.C.C.993 (1949), the Commission stated:

> The network regulations are designed to insure that control of the individual stations is not forfeited to a network organization with which such stations are affiliated. The networks, as such, are not licensed by the Commission and are under no statutory obligation to serve the public interest. The Chain Broadcasting Regulations, therefore, are designed to govern

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[7] "The inability of most UHF stations to obtain network affiliation, or if affiliated, to obtain sufficient network commercial programs was an important factor in the limited development of the UHF service." Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H.R. Rep. No. 1297, 85th Cong., 2d Sess., 226 (1958).

> the conduct of the individual stations rather than the networks . . . .

Moreover, the Commission has expressly advised Congress that it "has no jurisdiction over networks as such and the Commission does not have authority to license or regulate networks."[8] And that it "cannot reach networks directly."[9] Direct regulatory control over networks has only been sought (and unsuccessfully) through application for such authority from Congress.[10] The assertion of jurisdiction over CATV through the microwave carrier is a flat and absolute contradiction with the disclaimer of jurisdiction over networks.

In *Federal Power Commission v. Pan Handle Eastern Pipe Line Co.*, 337 U.S. 498 (1949), the FPC under its controlling statute was empowered to issue certificates of convenience and

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[8] H.R. Rep. No. 1297, 85th Cong., 2d Sess., 628 (1958).

[9] Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce, *Responsibilities of Broadcasting Licensees and Station Personnel*, 86th Cong., 2d Sess., 672 (1960).

[10] With the support of the Commission, two bills were introduced in the 86th Congress. One was H. R. 5042 (entitled in part "A Bill To Amend the Communications Act of 1934 To Subject Television Networks to Certain Controls"), and the other was H. R. 11340 (entitled in part "A Bill To Amend the Communications Act of 1934 . . . To Provide for the Regulation of National Networks"). H. R. 5042 provided authority for the Commission to make rules and regulations directly applicable to the television networks, while H. R. 11340 provided for the exercise of regulatory authority over the networks under a mandatory system of licensing national networks. Each was designed to give the Commission specific regulatory authority over the networks. See H. R. Rep. No. 281, 88th Cong., 1st Sess., 149-50 (1963). Neither bill was enacted, and similar legislation, introduced in the 87th Cong., 1st Sess. as S. 2400, also failed of enactment.

necessity for interstate transportation and sale of natural gas and "to do the things appropriate to carry out the provisions of the Act." The Supreme Court held that this general power over gas producers and broad power to carry out the intentions of the Act did not empower the Commission to approve the sale of leases of gas reserves, even when the leases involved were used to justify the issuance of the certificates of convenience and necessity. Thus, the Supreme Court, while recognizing a general jurisdiction over gas producers, did not condone a broad control over every phase of its business activity. In the instant case, the Commission has transgressed much further than the Federal Power Commission. It seeks not to limit and control any activity by microwave common carrier, for it may carry the same material undiluted, but seeks to limit and control the business activity of the common carrier's customer – the CATV system. All of the affirmative action for compliance with the rules must be performed by the unlicensed CATV system.

Similarly, *Alaska Airlines v. Civil Aeronautics Board,* 257 F. 2d 229 (D.C. Cir., 1958), *cert. denied* 358 U.S. 881 (1958), limited the Board's control over depreciation practices of airlines, notwithstanding its general and broad authority to control the economic practices of the airlines under its jurisdiction. Jurisdiction did not confer control over *all* of the business activity of its licensees. Here, it is not only the extent of authority which is at issue, but whether jurisdiction can be stretched to cover an entirely different class of persons, not heretofore regulated or licensed by the Federal Communications Commission.

In *Regents of the University System of Georgia v. Carroll,* 338 U.S. 586 (1950), the Commission had refused a renewal of a license unless the station owner repudiated a contract for operation and management of the station. In permitting a

damage action between the contracting parties, the Court defined the ambit of the Commission's jurisdictional reach. The Commission's authority was, of course, limited by its controlling and creating statute which empowered it to exercise regulatory control only with the respect to the issuance of licenses.

> Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. It is in connection with this power that Section 303(r) is to be interpreted. The Commission may impose on the applicant conditions which it must meet before it would be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibility to a third party dealing with the applicant. 338 U.S. at 600.

The Court observed that the Commission had applied for additional authority to issue cease and desist orders, which subsequent to the decision was granted, but "the Commission request did not go beyond asking for power to issue a cease and desist order against a licensee. *No power was sought against a third party.*" [Emphasis added] 338 U.S. at 602. Here the Commission's authority is similarly restrained against imposing any regulations or restrictions or by enforcing any such regulations and restrictions against a third party. It is not merely an issuance of the licenses through which the Commission now seeks to assert its control over microwave users (although it conditions grants of licenses on user contracts promising non-duplication). However, it is the continuing exercise and performance imposed, not upon the licensee microwave carrier, but upon the third party non-licensee user. The licensee microwave carrier's activity and revenue remain unchanged, except that he becomes the conduit of jurisdiction. It is the ultimate user who has become subject to an entire

new scheme of regulatory power and without any protections or rights afforded to ordinary licensees by the Commission.

The Commission's jurisdiction over microwave must stand upon whether or not it can regulate CATV systems directly. It is the ultimate purpose and action which must be judged in determining the Commission's jurisdiction. The Commission itself maintains that it has this broad jurisdiction, and if so, it does not have to proceed behind a screen by manipulating the license of the microwave carrier. On the other hand, if the Commission lacks the jurisdictional authority over CATV systems, it cannot gain it through the back door by regulations addressed to the microwave carrier but operable only against CATV systems. Radio licensing jurisdiction over microwave carriers is not regulatory control over these microwave carriers for any and all purposes; it is limited to reasonable regulation to perform microwave common carrier service. It does not extend to the control over the business activity of the common carrier's customer.

The *First Report and Order, supra,* contains no jurisdictional statement. The Commission relies principally upon its statement in *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), which was affirmed in *Carter Mountain Transmission Corp. v. Federal Communications Commission,* 321 F. 2d 359 (D.C. Cir., 1963), *cert. denied,* 375 U.S. 951 (1963). This jurisdictional position is examined at length in Commissioner Loevinger's dissent, 38 F.C.C.at 756,[11] which explains that *Carter Mountain* involved a CATV relay company in its application for authority to transmit television signals by microwave to a small community with one local television station. After an evidentiary hearing, the Commission found that the grant of

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[11] Quoted in full, Appendix A, p. 19a.

the microwave authority would destroy the local television station. Thus, the case turned upon the public interest factors in the grant of a specific license. The Commission's opinion stated:

> There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant (32 F.C.C. at 462).

This decision provides a thin precedent for the jurisdiction that the Commission now asserts over CATV systems. Without examination, the D.C. Circuit broadly approved the Commission action and invited further extension of jurisdiction. Relying on *Carter Mountain* the same court approved without further examination CATV jurisdiction through the microwave carrier in *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F. 2d 729 (1965). However, the D.C. Circuit, which broadly favors the extension of administrative jurisdiction and control, without examining the legislative history and on the very narrow issues presented to it, has broadly upheld Commission jurisdiction over all CATV in *Durkee Cablevision Inc. v. Federal Communications Commission*, ___ F. 2d ___ (D.C. Cir., 1967), in conflict with this Court's earlier holding in *Southwestern Cable Co. v. United States*, 378 F. 2d 116 (9th Cir., 1967), cert. granted, 389 U.S. 911 (1967). No other circuit has given judicial approval to these rules[22] and it is submitted that the D.C. Circuit's holding is not persuasive.

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[22] Action challenging the validity of these rules was pending in a number of circuits, including the D.C. Circuit, which were transferred and consolidated in the Eighth Circuit in *Black Hills Video Corporation et al. v. United States*, Nos. 18,051 and 18,341.

Ultimately, the Commission's jurisdiction must stand or fall on its direct jurisdiction over CATV systems themselves. This jurisdiction must be judged in the context of what the Commission seeks to accomplish and what parties or activities the Commission intends to control.

B. The Commission Cannot Restrict or Regulate the Content of Material Carried by Common Carrier Microwave Service Since This Regulation Impinges the Customer's Right of Access to and Equality of Service.

Under the Communications Act of 1934, a common carrier is "any person engaged as a common carrier for hire in interstate or foreign communication by wire or radio . . ." 47 U.S.C. 153 (h). Microwave transmission of television signals is a common carrier service. *Mesa Microwave, Inc. v. Federal Communications Commission*, 262 F. 2d 723 (D.C. Cir., 1958), and as such is subject to common carrier regulation under Title II of the Communications Act. 47 U.S.C. 201-222. The Commission originally held that regulation of common carrier facilities did not properly include the lawful use of those facilities by CATV systems. *CATV and TV Repeater Services*, 26 F.C.C. 403, 432-433 (1959):

> 75. We are of the opinion that, in relation to the authorization of a common carrier facility, whether it be for a radio facility under title III of the act or a wire facility under title II, it is neither proper, pertinent, nor necessary for us to consider the specific lawful use which the common carrier subscriber may make of the facilities of the carrier. To take a different view would place the

> Commission in the anomalous position of acting as a censor over public communications, and put us under the burden of policing, not only the use of such facilities but the content of communications transmitted on the facilities. The logical extension of such a philosophy would require us to deny communications facilities of any kind (message telephone, telegraph, etc.) to CATV's and, for example, to deny access to facilities to those acting contrary to our concept of the public welfare. The adjudication of these matters is beyond our province.

This view is consistent with the provisions in Title II of the Act. Section 201 obligates the common carrier to furnish free access and availability upon reasonable request for service. Discrimination and preferences in charges, facilities or services are prohibited by Section 202(a), 47 U.S.C. 202(a). The Act directs the Commission to examine transactions entered into by common carriers which affect the services rendered and to report to the Congress whether any transactions are likely to affect adversely the ability of the carrier to render adequate service to the public. 47 U.S.C. 215(a). Common carrier service cannot be arbitrarily or discriminatorily applied or withheld, but the public has a right to demand common carrier communication service. *Pulitzer Publishing Co. v. Federal Communications Commission,* 94 F. 2d 249, 251 (D.C. Cir., 1937).

At the root of common carrier service, whether it be transportation or communication, is availability to all users on the same terms and conditions. *Seaboard Airline Railway Co. v. United States,* 254 U.S. 57 (1920); *New York v. United States,* 331 U.S. 284, 296 (1947). Here, the common carrier rules are subverted for jurisdictional purposes and used in conflict with the essential character of common carrier service—

free access and non-discrimination. The Commission in protecting the public's right to free access and equality of service is limited by the terms of the Act from imposing discriminatory treatment or conditions.

Common carrier service and radio broadcasting present two distinct problems covered in different parts of the Communications Act. This distinction is recognized in *Federal Communications Commission v. Sanders Brothers Radio Station,* 309 U.S. 470, 474 (1940):

> In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such . . . .

See also *Allen B. Dumont Laboratories, Inc. v. Carroll,* 184 F. 2d 153 (3rd Cir., 1950); *United States v. Radio Corporation of America Communications,* 358 U.S. 334, 348-350 (1959). The Commission recognized the distinction between the two regulatory schemes in *Southeastern Enterprises (WCLE),* 22 F.C.C. 605, 615 (1957): "Congress has not given us the power, as in the case of the carriers that we regulate under Title II, to regulate the business of a broadcast licensee."

Both parts of the Act have the same statutory criterion – the public interest, convenience and necessity – which must be satisfied in licensing both broadcast stations and common carriers. However, this statutory standard is subject to vastly different interpretations when applied to the different services. Public interest criterion in the field of common carrier

licensing "is not a mere general reference to public welfare" but relates particularly to the "adequacy of [common carrier] service, to its essential conditions of economy and efficiency, and to appropriate provision and the best use of [its] facilities." *Texas v. United States,* 292 U.S. 522 (1934). The Commission explained the differences in *CATV and TV Repeater Services,* 26 F.C.C. 403, 432 (1959):

> In the case of the common carrier applicant, in addition to the showing of legal, technical, financial, and other qualifications, there is, typically, the necessity for showing that there are no other public communication facilities available to do the specific job proposed; that the applicant is ready, able, and willing to serve all members of the public who may desire the service, without discrimination; and that there is now in being one or more members of the public who require the service, or some reasonable expectancy that one or more such persons will present themselves if the facility is authorized. *There is no examination of the "content" of the intelligence which is to flow over the communication circuit.* [Emphasis added.]

See also *Pulitzer Publishing Co. v. Federal Communications Commission,* 94 F. 2d 249, 251 (D.C. Cir., 1937). Thus, the public interest in a national scheme of television allocations is quite different from the public's right of free access to common carrier service, and the statutory powers and obligation to enforce the latter may not be subverted in promoting the immediate policy of the former.

In the instant case the Commission seeks to limit and control the use of common carrier service by imposing a set

of regulations on the activity of the user of common carrier service. The "privilege" of any common carrier microwave service for the transportation of television signals is made conditional upon guarantees of non-duplication and exclusivity to be carried out and enforced by the customer CATV system. Thus, the Commission's rules strike at the very heart of the user's right to common carrier service. There is no precedent for such unbridled use of federal regulatory power where the access to common carrier service or public utility service in the conduct of legitimate business activity is conditioned upon compliance and adherence to discriminatory standards and rules which the Commission seeks to impose in order to protect a favored class of licensees. Even if the Commission were empowered to protect a favored class of broadcasters by restraining trade and competition, it may not do so at the expense or diminution of the public's right to common carrier service. Protecting this public right is a disparate function of the Commission's duties distinguished from its licensing of radio in the public interest. In confusing the two functions the FCC does disservice to both.

In *American Trucking Association, Inc. v. Federal Communications Commission,* 377 F. 2d 121, 130 (D.C. Cir., 1966), *cert. denied,* 386 U.S. 943 (1967), the court explained that Section 202(a), 47 U.S.C. 202(a), was a flat bar against *any* discrimination by *any* means or *any* undue preferences to *any* person. That case upheld the Commission's ruling against rate preferences imposed in common carrier telephone service using microwave transmission. Here, it is the Commission's rules governing microwave transmission which unduly discriminate against the CATV user of the common carrier service in favor of the broadcast user. In effect, the Commission maintains that it can compel the common carrier to do by regulation what would be unlawful for the carrier to do under the Act.

If the common carrier is prohibited by the Act from discrimination and preferences in service, *a fortiori* the Commission charged with the enforcement of the Act is restrained from requiring discriminatory and preferential treatment in the use and distribution of common carrier service.

The courts have consistently and repeatedly struck down discriminatory practices by common carriers which give a competitive advantage to one user over another, *New York, New Haven, and Hartford Railroad v. Interstate Commerce Commission,* 200 U.S. 361, 391-392 (1906); *United States v. Chicago Heights Trucking Co.,* 310 U.S. 344, 351 (1940). Indeed, it is the fact that the practice gives a competitive advantage in the use of common carrier service which marks it as an unlawful discrimination in violation of the public's right to common carrier service. *Union Pacific Railroad Co. v. United States,* 313 U.S. 450, 461-462 (1941). These principles of free access and non-competitive advantage apply with equal force in common carrier wire and radio communications where the common carrier sections of the Act were modeled after the ICC Act.[13]

The Commission's microwave CATV rules represent to date the broadest jurisdictional encroachment of any administrative agency. They impose a set of restrictive operational rules in exchange for the grant of a license to provide common carrier service to which the public at large is entitled; they are addressed to the licensee, but they operate exclusively against the non-licensee in the regulation of its business activity; they impose a pervasive set of rules to reduce competition of the non-licensee and in protection of a favored class of

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[13] S. Rep. No. 781, 73rd Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73rd Cong., 2d Sess. 3 (1934).

licensees, the broadcasters; and they strip from the non-licensee the ordinary procedural safeguards available to all licensees.

In sum, these rules subvert the entire scheme of common carrier regulation to accomplish entirely different purposes of the agency outside of its obligation to protect the public interest in the maintenance of open and adequate common carriage for hire. In promotion of television broadcasting – a "favored class" of licensee – the rules compel a scheme of restricted access and enforced discrimination. Restrictive regulation of CATV competition through the jurisdictional medium of common carrier microwave is directly in conflict with the statutory obligation of the Commission to enforce free access and equality of service in public common carrier licensing, and, accordingly, is invalid.

II.

The Federal Communications Commission Lacks Statutory Authority To Regulate CATV Business.

A. The Substantive Titles of the Communications Act, Title II (Common Carriers) and Title III (Radio Licensing), Fail to Provide a Statutory Basis for CATV Regulation.

The Communications Act of 1934, placed under one agency unified control over all forms of electrical communications. The Act transferred to the newly created Federal Communications Commission the functions of the Interstate Commerce Commission regarding common carriers, and the functions of the Federal Radio Commission regarding radio. The provisions of the Interstate Commerce Act, 41 Stat. 475,

pertaining to common carrier regulations became Title II of the Communications Act, 47 U.S.C. 201-222, and the provisions of the Radio Act of 1927, 47 Stat. 1162, 47 U.S.C. 81 *et seq.*, became Title III of the Act, 47 U.S.C. 301-397.[14] The Act did not create any new areas of federally regulated activity. Title I created the Commission and sets forth its purposes and definitions which cover its disparate functions contained in Titles II and III.

If there is any authority or jurisdiction over CATV, it must come from either Title II or III since the other titles provide no independent substantive authority.[15] Of these two, Title II has no application, since the Commission has stated that CATV operations do not constitute common carrier activities under the Act. *Philadelphia Television Broadcasting Co. v. Federal Communications Commission,* 359 F. 2d 282 (D.C. Cir. 1966).

In attempting to establish its tenuous jurisdiction the Commission first relies upon the general purposes and definitions contained in Title I, entitled "General Provisions."[16]

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[14] S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H. R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934).

[15] Of the remaining three parts to the Act, Title IV pertains to procedural and administrative requirements; Title V, penalties for violations of the Act; and VI, miscellaneous housekeeping provisions.

[16] The Commission's jurisdictional statement is contained in Appendix C to the *Second Report and Order,* 2 F.C.C. 2d at 793-797, entitled "Commission's Memorandum on Its Jurisdiction and Authority." This memorandum apparently embraces both microwave and non-microwave. We have argued in Part I that regulation over CATV may not be acquired through the conduit of the microwave common carrier, nor in derogation of the Commission's obligation

(continued)

Section 1, 47 U.S.C. 151, explains that the purposes of the Act are "regulation of interstate and foreign commerce in communication by wire and radio," and Section 2(a), 47 U.S.C. 152(a), explains that "*The provisions of this Act* shall apply to all interstate and foreign communications by wire or radio and . . . transmission of energy by radio. . . ." [Emphasis added.] Section 3(a) of the Communications Act, 47 U.S. C. 153(a), defines "wire communication" or "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services . . . incidental to such transmission."

Solely from these introductory provisions of the Act, the Commission argues that CATV, although not a common carrier, is "wire communication," and using the definition in 3(a) as a spring board, claims that it possesses Title III powers of regulation and rule making over CATV, as contained in Sections 4(i), 303(f), 303(h), and 307(b) of the Act. This rationale is false since: (1) Title I conveys no substantive rights but only defines terms used throughout the Act; (2) the definition of "wire communications" pertains only to Title II common carriers; (3) the legislative history indicates disparate functions over common carrier wire communication on the one hand and radio on the other, combined for convenience under one Act and with one set of definitions; and (4) Title III pertains essentially to *licensing* of radio transmission and not restriction of reception.

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16 (continued)

to protect free access to common carrier service. We argue here that the Commission likewise lacks jurisdiction to regulate CATV directly.

The Radio Act of 1927 contained a definition of "radio communication" in Section 31 (47 U.S.C. 111) which is essentially the same as Section 3(b) of the Communications Act. However, the Radio Act of 1927 contained no definition of "communication by wire" similar to Section 3(a) upon which the Commission now relies. Section 3(a) is derived from Section 1(3) of the Interstate Commerce Act (41 Stat. 475) which related only to activities of common carriers. Section 3(a) was incorporated into the Communications Act for the purpose of defining the applicability and impact of Title II powers which the FCC took over from the ICC.

Title III conferred upon the FCC the authority which the Federal Radio Commission had with respect to communication by radio and Title II conferred upon the FCC functions which the ICC had with respect to activities of common carriers. No crossover was intended and none was achieved. This intent is manifested in the Act's legislative history.[17] Moreover, the FCC has never before claimed or attempted to confuse these distinct functions. Prior to 1934, the Federal Radio Commission could not under the predecessor of Title III of the Communications Act adopt rules and regulations with respect to wire communication and, prior to 1934, the ICC could not exercise Title III powers with respect to persons engaged in common carrier activities. Section 2 is simply a declaration of purpose that the authority of the Commission applies in appropriate cases to communication by wire and in other cases to communication by radio, and by its terms is restricted to apply only to other "provisions of this Act." 47 U.S.C. 152(a).

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[17] S. Rep. No. 781, 73d Cong., 2d Sess. 1 (1934); H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934); H.R. Rep. No. 1918, 73d Cong., 2d Sess., p. 47 (1934).

Conceding that CATV systems are not common carrier services, the Commission nonetheless maintains that "communication by wire" in Sections 1 and 2(a) of the Act, is not confined to common carriers. These sections, according to the Commission, are a separate and independent grant of authority to regulate non-common carrier wire communications which include CATV activities.

Under Section 2(a) of the Act the Commission does not have authority to regulate CATVs engaged in wire communication, since the explicit terms of Section 2(a) limit the Commission's authority to the "provisions of this Act" and the Act is without any such "provisions," substantive or procedural, or authority relating to wire communication by non-common carriers in general and CATV in particular.[18]

The absence of any such regulatory provisions relating to non-common carriers engaged in wire communications, when contrasted with the comprehensive regulatory regime governing radio and common carriers spelled out in detailed provisions implementing Section 2(a), reveals the purpose of the Act to regulate common carriers, but not to regulate non-common carriers engaged in wire communication.

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[18] The terms "wire communication" or "communication by wire" appear in a number of sections of the Act other than Sections 1 and 2(a). Thus one or the other term is used in a number of the provisions of Title II, however only in connection with common carriers. Moreover, the terms may also be found in Sections 2(b), 3(a), 3(e), 4(b), 4(k), 4(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605 and 606 of the Act, 47 U.S.C. Secs. 152(b), 153(a), 153(e), 154(b) 154(k), 154(o), 406, 410(a), 412, 502, 503(a), 602(b), 602(d), 604(c), 605, 606 (1964).

The legislative history of the Act expresses the intent to exclude from Commission regulatory authority non-common carrier wire communication. The statement of the managers on the part of the House, included in the Conference Report, noted that the Senate version of Section 3(h), 47 U.S.C. Sec. 153(h) (1964), had been adopted:

> It is to be noted that the definition does not include any person if not a common carrier in the ordinary sense of the term, *and therefore does not include press associations* or other organizations engaged in the business of collecting and distributing news services which may refuse to furnish to any person service which they are capable of furnishing, and may furnish service under varying arrangements, establishing the service to be rendered, the terms under which rendered, and the charges therefor. H.R. Rep. 1918, 73d Cong., 2d Sess. 45-46 (1934) (Emphasis added).

Thus, the draftsman deliberately excluded any wire communication other than common carriers outlined in Title II.

B. Title III Pertains to Radio Transmission, Rather Than Reception and Distribution by Cable, and Establishes a System of Licensing Regulation.

The method of regulation under Title III of the Act chosen by Congress is *licensing*. *Regents of the University of Georgia v. Carroll*, 338 U.S. 586 (1950). See also *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 289-290 (1954).

In *Southwestern Cable Co. v. United States,* 378 F. 2d 118 (9th Cir. 1967), *cert. granted* 389 U.S. 911 (1967), this Court examined the basis for the Commission's newly asserted jurisdiction over CATV and held that the "method of regulation of *broadcasting* chosen by Congress was licensing." Since petitioner here, as in *Southwestern,* is a CATV operator, and as such neither a licensee nor applicant for license, petitioner is beyond the ambit of the Commission's licensing authority and control. Commission attempts to regulate CATV other than by its licensing procedure are invalid. Since CATV systems seek no radio frequencies in their operations and are not before the Commission for license application, modification, or renewal, the Commission is without jurisdiction or authority to regulate them.

CATV operation is a reception service and not a transmission service. The whole thrust of the Radio Act of 1927 and Title III of the Communications Act of 1934 was to confer on the Federal Radio Commission and the FCC authority over transmission, but not over reception. Section 301 of the Communications Act, 47 U.S.C. 301, defining the scope of Title III of the Communications Act, makes this abundantly clear when it states:

> It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign *radio transmission;* and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority . . . [Emphasis added.]

There is nothing in any of the specific statutory provisions cited by the Commission as the basis for its authority

which indicates that the Commission's Title III authority extended to anything but regulation of transmission. Sections 4(i) and 303(r) give the Commission broad rule making authority to carry out the provisions of the Act. But by themselves they confer no independent power; they are dependent upon other substantive provisions.

Section 303(f) authorizes the Commission to promulgate rules and regulations designed to prevent interference among stations. This section clearly relates to transmission alone. There is nothing whatsoever in the activities of CATV that directly or indirectly causes any interference among stations and the CATV rules do not relate to transmission interference. Section 303(h) authorizes the Commission to establish areas or zones to be served by stations. Again, the subject matter is clearly transmission.

The last "crucial" section relied upon by the Commission for regulatory power over CATV is Section 307(b). This section provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

By its terms this section is limited to transmission and its method of regulation is by license, whether it be applications for licenses, modifications, or renewals. Section 307(b) provides that when conflicting demands exist for frequencies, the Commission is to make an equitable allocation.

The inconsistency of the Commission's present position and the over-reaching nature of its CATV jurisdictional grab is perhaps best illustrated by its conduct in 1962 in connection with the All-Channel Receiver Law. In 1962, the Commission sought and received Congressional legislation designed to allow the Commission to require UHF reception capability for all commercial television receivers. (47 U.S.C. 303(s), 330 (1962), H. Rep. No. 1559, S. Rep. No. 1525, 87th Cong., 2d Sess. (1962).)

The Commission recognized that its authority over reception devices was inadequate, and in requesting the All-Channel Receiver Law, it candidly stated to the Congress (Hearings on H.R. 8031 before the House Committee on Interstate and Foreign Commerce, 87th Cong., pp. 7-8 (1962)):

> In the Communications Act of 1934, Congress vested the Federal Communications Commission with the responsibility of making available to all people of the United States, an efficient and nationwide communications service, and certain authority to carry out these responsibilities. Our request for this legislation is an expression of our feeling that in the area of television reception systems, our present authority is not commensurate with our responsibilities . . . .

The Congress obviously agreed with the Commission as to lack of authority over reception for it proceeded to enact the All-Channel Receiver Law, which added to the Communications Act the only reference or application to radio reception.

There is no significant distinction between limitation on the use of individual *receiving* sets and the present attempted foreclosure or limitation on the use of various CATV receiving apparatus. The Commission was obviously right in 1962 in

asking Congress for a specific grant of authority to deal with the subject of reception. Its claim now under Title III of the Communications Act to deal with the subject of CATV is an outright usurpation of authority.

C. The Commission Lacks Any Statutory Standard to Regulate Non-Common Carrier Wire Communications

The Communications Act contains both general and detailed standards for the regulation of radio communication and common carriers. Radio licensing under Title III must be administered in the "public interest, convenience, or necessity." Similarly, regulation of common carriers under Title II must be in the "public convenience and necessity," 47 U.S.C. 214.[19] These general standards are given meaning and substance in numerous provisions of the Act dealing with substantive, procedural and remedial matters relating to the regulation of common carriers and radio communications. Those provisions incorporate the basic legislative standards governing the regulatory authority conferred on the Commission. They specify in detail the substantive and procedural criteria for

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[19] As explained in part I, these similar standards are given vastly different interpretations relating to the public interest considerations, protections, and rights under each regulatory category and problem.

regulation under Title II[20] and under Title III.[21]

The Act contains no such similar structure of substantive and procedural provisions for wire communication engaged in by non-common carriers. The general regulatory provisions relied upon by the Commission for its jurisdiction over CATV qualify the power granted with limitations such as "not inconsistent with this Act, as may be necessary in the execution of [the Commission's] *functions*" (Section 4(i));"not inconsistent with law as it may deem necessary . . . to carry out the *provisions* of this Act" (Section 303(f));"or as may be necessary to carry out the *provisions* of this Act" (Section 303(r), emphasis added). However, with respect to non-common carrier wire communication there are no "provisions of this Act"

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[20] *E.g.*, unjust and unreasonable discriminations, 47 U.S.C. Sec. 202(a); the use of franks and passes, 47 U.S.C. Sec. 210(a); adequacy of facilities, extension of lines and public offices, 47 U.S.C. Sec. 214(d); required records and depreciation practices, 47 U.S.C. Sec. 220(a)(b); length of suspension of new charges, and hearing requirements, 47 U.S.C. Sec. 204; court injunction involving reductions or extensions of service, 47 U.S.C. Sec. 214(c); cease and desist authority, 47 U.S.C. Sec. 205(a); claims for damages in proceedings instituted either in the courts or before the Commission, 47 U.S.C. Secs. 206, 207, 208 and 209.

[21] *E.g.*, classification of radio stations, including areas and zones served and power and time of operation, 47 U.S.C. Sec. 303; restrictions on grants to aliens, 47 U.S.C. Sec. 310; operation of transmitting apparatus by licensed operators, 47 U.S.C. Sec. 318; standards for distribution of licenses, frequencies, hours of operation and power among the several states and communities, 47 U.S.C. Sec. 307(b); terms of licenses and standards, as well as procedural requirements governing renewals, 47 U.S.C. Sec. 307(d); and substantive and procedural conditions governing modification, suspension and revocation of licenses, 47 U.S.C. Secs. 303(f), 303(m), 312 and 316.

or Commission "functions" defined elsewhere in the Communications Act to give meaning or limit to these general regulatory powers. And in the absence of any substantive and procedural authority or limitation, the Commission's argument is reduced to the contention that it has the jurisdiction to regulate CATV, *i.e.*, wire communication conducted by non-carriers, for whatever purposes and means it may consider appropriate.

A further difficulty with the Commission's position is that it chooses from only one of the multitude of objectives contained in the Act, some of which relate to radio communication and some of which relate to common carriers, to provide the required standards. The *First Report and Order* states that the Commission made the judgment that CATV should operate in a supplemental or auxiliary role to broadcasting and that the development of CATV should be limited by this objective. The explicit premise of the objective which it chose was to protect and insulate from competition the broadcast industry which it does have the power to regulate. On this theory, the Commission might have been equally free to choose entirely different objectives as the bases for regulation. Instead of protecting broadcasting against competition, it might have concluded with equal "validity" that the mandate of Section 307(b) of the Communications Act, which provides for a "fair, efficient and equitable distribution of radio service," requires that television broadcasting be curtailed and replaced by CATV in order to conserve valuable spectrum space. Alternately, the Commission could have with equal logic chosen to regulate CATV in such a manner as to supplement common carrier service but to curb any threat it may present to communication common carriers. The availability of such a wide choice of regulatory objectives amounts to no statutory standard whatsoever.

Even if it were possible to conclude that Sections 303(h) and 307(b) provide a substantive standard of some sort, no procedural standards whatsoever are provided for the regulation of non-common carrier wire communication. In the area of radio and common carrier regulation, procedural provisions of the Act operate to give meaning and assure procedural due process in the Commission's exercise of the delegated regulatory powers. To choose but two examples, radio stations licenses may be modified under Section 316 of the Act, but that provision requires a prior hearing on request. Similarly, the Commission is authorized under Section 214(d) of the Act to require a carrier to improve its service by providing adequate facilities, extending lines, etc. However, that provision requires a prior "full opportunity for hearing."

The complete absence of either procedural or substantive standards for the asserted authority to regulate CATV as a non-common carrier wire communication activity permits only one of two possible conclusions. The first is that even if Congress may have intended the Commission to exercise regulatory authority over such activity, the attempted delegation is invalid for lack of standards. *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).[22] The second is that the lack of standards evidences Congress' intent that such activities not be

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[22] It is recognized that these cases have been roundly condemned in their invalidation of important New Deal legislation for lack of adequate legislative standards. They have however been given some new life by the dissent of Justice Harlan in *Arizona v. California*, 373 U.S. 546, 625-626 (1963). Certainly, here they have added force where it is not the legislative standard fixed by Congress which is challenged, but the stretching of this standard by the administrative agency to embrace a wholly new class of persons under an entirely new scheme of regulatory control.

regulated. The latter conclusion is wholly consistent with the legislative history and structure of the Act.

D. An Administrative Ruling Recognized by the Courts and Acquiesced to by Congress Has the Force of Law and Cannot be Overturned by the Agency.

It is a well settled principle of statutory construction that a prior and consistent administrative interpretation is given great weight by the courts, *Norwegian Nitrogen Products Co. v. United States,* 288 U.S. 294, 313-315 (1933). Even greater weight is given to the administrative interpretation where Congress becomes aware and acquiesces to the construction of the statute as interpreted by the administrative agency. *United States v. Leslie Salt Co.,* 350 U.S. 383, 396-397 (1956), affirming the decision of this Court, 218 F. 2d 91 (9th Cir. 1954).

The conclusiveness of the original administrative interpretation is strengthened where the question is the scope and power of the agency to issue legislative rules, *United States v. American Trucking Association,* 310 U.S. 534, 549 (1940). It is likewise strengthened where the courts have recognized the prior administrative interpretation, *Corn Products Refining Co. v. Commissioner of Internal Revenue,* 350 U.S. 46, 53 (1955); *N.L.R.B. v. Gullet Gin Co.,* 340 U.S. 361, 365-366 (1951). But where the Congress is deemed to have approved the long-standing administrative interpretation by not amending or by re-enactment of the statute, the interpretation has the force and effect of law. *Helvering v. Winmill,* 305 U.S. 79, 83 (1938), cited with approval in *Fribourg Navigation Co. v. Commissioner of Internal Revenue,* 383 U.S. 272 at 283-284 (1966);

J. C. Boswell Company v. Commissioner of Internal Revenue, 302 F. 2d 682, 685 (9th Cir. 1962), *cert. denied* 371 U.S. 860 (1962).

Since 1958, the FCC had frequently and consistently held that it did not have regulatory jurisdiction over the operation of community antenna television systems either directly or through the microwave carrier. *Frontier Broadcasting Co. v. Collier,* 24 F.C.C. 251 (1958); *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959); *WSTV, Inc. v. Fortnightly Corp.,* 23 Pike and Fischer R.R. 184 (1962). This absence of jurisdiction over CATV was judicially noticed by this Court in *Cable Vision, Inc. v. KUTV, Inc.,* 335 F. 2d 348 (9th Cir. 1964), *cert. denied,* 379 U.S. 989 (1965).

In an effort to acquire limited CATV jurisdiction the agency's want of jurisdiction was first brought to the attention of the 86th Congress along with certain legislative recommendations of the Commission, 105 Cong. Rec. 6753 (1959).[23] Lengthy hearings through the summer and fall of 1959 were held by a subcommittee of the Senate Committee on Interstate and Foreign Commerce on the legislation proposed by the FCC.[24] The full Senate Interstate and Foreign Commerce Committee then favorably reported a bill to grant the Commission jurisdiction to regulate community antenna systems in certain circumstances. S. Rep. No. 923, 86th Cong., 1st Sess.

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[23] For a legislative history of the Commission's unsuccessful attempts to get a jurisdiction grant from the Congress over CATV see Appendix A, p. 37a.

[24] *Hearings before the Communications Sub-Committee of the Committee on Interstate and Foreign Commerce, United States Senate,* 86th Cong., 1st Sess. (1959), *of VHF Booster and Community Antenna Legislation.*

(1959), accompanying Senate Bill 2653 entitled "A Bill to amend the Communications Act of 1934 to establish jurisdiction in the Federal Communications Commission over community antenna systems." In 1960, after several days of debate, the Senate recommitted the bill and no legislation authorizing FCC regulation of community antenna systems was enacted by the 86th Congress. 106 Cong. Rec. 10520, 10547 (1960).[25] Again, in 1961, the FCC submitted to the 87th Congress proposed legislation giving it jurisdiction to regulate community antenna systems. 107 Cong. Rec. 2523 (1961); S. 1044 and H.R. 6864, 87th Cong., 1st Sess. (1961). The 87th Congress similarly failed to enact any legislation conferring the Commission with jurisdiction over the community antenna industry.

Following these unsuccessful attempts to attain Congressional grant of jurisdiction, the Commission in a series of proceedings culminating in the *Second Report and Order,* 2 F.C.C. 2d 725 (1966) reversed its prior rulings and assumed regulatory control over CATV systems under its rule-making procedures. Thus, the Commission upset and reversed its prior holdings that it had no jurisdiction over CATV, which was then in its fifteenth year of operational history.

Uncertain of this bold usurpation of jurisdiction, the Commission again appealed to Congress for jurisdiction over CATV systems, House Report 1635, 89th Congress, 2nd Sess., submitted June 17, 1966 to accompany H.R. 13286. This bill failed to pass the Congress as did the prior attempts. By its assumption of jurisdiction, the Federal Communications Commission has erroneously attempted to reverse its prior decisions which, by court recognition and Congressional approval, had assumed the force and effect of law.

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[25] For extracts of the debate see Appendix B, pp. 43a-52a.

The Supreme Court has rarely departed from its doctrine of longstanding administrative interpretation. The arguments for departure are generally factual: that there is a doubt as to whether the administrative agency did in fact decide the matter, *Baltimore and Ohio Railway Company v. Jackson,* 353 U.S. 325, 330-331 (1957); that Congress did not clearly acquiesce to or approve the administrative ruling, *Cammarano v. United States,* 358 U.S. 498, 510-511 (1959); or that there was no approval since Congress had failed to focus on the issue, *Fribourg Navigation Co. v. Commissioner of Internal Revenue,* 383 U.S. 272, 283-284 (1966).

In the latter two cases the Court rejected the argument for departure on adverse findings. Here the agency passed upon its jurisdiction and found it had none. The Congress approved this ruling when it rejected the proposed amendment "to establish jurisdiction in the Federal Communications Commission over community antenna systems."

The FCC, created by Congress, performs rule-making functions designated by Congress. Its jurisdiction and purposes are set out in its controlling statute with great specificity. It has usurped jurisdiction, which it consistently held it did not possess, and which the Congress repeatedly failed to grant after a number of attempts. The Commission's prior administrative interpretation that it did not possess jurisdiction, recognized by the courts and acquiesced to and approved by the Congress, has the force and effect of law and cannot be overturned by a subsequent ruling by the Commission.

III.

The Non-Duplication Rules Restricting the Reception and Distribution of Television Signals Are in Violation of the First Amendment.

The Commission's non-duplication rules in Sections 21.712 and 74.1103, and its summary order against petitioner are a prior restraint in the reception and distribution of information and tread upon free speech guarantees of the First Amendment. The non-duplication rules provide that the CATV system, upon request of the local television station, will black out same-day imported signals which duplicate local signals.

Respondents have stoutly maintained that the enforcement of the non-duplication rules eliminates no programming or the public's access to information, but merely the duplication of program materials already available to allow the local stations a competitive advantage. This argument does not conform to the facts in Great Falls, Montana. The principal service which petitioner markets is the availability of programs at times different from the exhibition of the same program by the local stations. Petitioner has voluntarily agreed to give simultaneous non-duplication protection, but the rule requires and respondents insist upon same-day non-duplication. Same-day non-duplication very immediately limits the access of the public to information and materials at the *times available to the viewer.* Furthermore, non-duplication eliminates public access to all but one of competing programs broadcast simultaneously by the local stations. Limiting petitioner's distribution of news, information, and program materials otherwise available by cable television is an unreasonable restriction

upon the exercise of free speech in violation of the First Amendment.

"The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute [and] the right to receive . . ." *Griswold v. Connecticut,* 381 U.S. 479, 482 (1965). Communication by any lawful means – motion picture, radio, television, newspaper, closed-circuit, hand-bill, the mails, etc. – falls within the constitutional protections provided by the First Amendment. *ABC v. United States,* 110 F. Supp. 374 (SD NY, 1953), aff'd *sub nom. Federal Communications Commission v. ABC,* 347 U.S. 284 (1954); *Weaver v. Jordan,* 64 Cal. 2d 235, 411 P. 2d 289 (1966), *cert. denied,* 385 U.S. 844 (1966).

The entire stream of communications from source to destination is constitutionally protected. This fundamental constitutional principle embraces not only the right of publication but also the rights of dissemination and distribution, as well as of reception. *Saia v. New York,* 334 U.S. 558 (1948); *Winters v. New York,* 333 U.S. 507 (1948); *Martin v. Struthers,* 319 U.S. 141 (1943). Circulation is equally protected. "Liberty of circulating is as essential to that freedom [freedom of press and speech] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Ex Parte Jackson,* 96 U.S. 727, 733 (1877); *Lovell v. City of Griffin,* 303 U.S. 444 (1938).

Once established that the communication or medium is constitutionally protected, the government shall impose no prior restraints or condition upon the free exercise of a benefit or privilege if the effect thereof is to "inhibit or deter the exercise of First Amendment freedoms." *Sherbert v. Verner,* 374 U.S. 398, 404-405 (1963); and see *LaMont v. Postmaster General,* 381 U.S. 301 (1965).

The primary purpose of the First Amendment, as it relates to speech and press, is to suppress prior restraints upon publication, circulation or distribution. *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952). With "respect to the vital importance of protecting this essential liberty from every sort of infringement" (*Lovell v. City of Griffin, supra,* at p. 452); see *Near v. Minnesota,* 238 U.S. 697 (1931); *Grossjean v. American Press Company, Inc.,* 297 U.S. 233; *DeJonge v. Oregon,* 299 U.S. 353 (1937). Freedoms [guaranteed by the First Amendment] . . . are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock,* 361 U.S. 510, 523 (1960).

Particularly objectionable is the practice of censorship exercised through the vehicle of licensing authority. "The struggle for the freedom of the press was primarily directly against the power of the licensor." *Lovell v. City of Griffin, supra,* at p. 451. See also the Chief Justice's dissent in *Times Film Corporation v. Chicago,* 365 U.S. 43 (1961). Indeed, any "intimidation" by the government upon *distribution* of constitutionally protected material, no matter what the purpose, is hostile to the mandate contained in the First Amendment and must be terminated forthwith. *Bantam Books v. Sullivan,* 372 U.S. 58, 70 (1963).

In the field of radio and television communications the only permissible restraint has been related to the physical limitation of available frequencies in the spectrum. In *NBC v. United States,* 319 U.S. 190 (1943), the Supreme Court held that *because of limitation of available frequencies* reasonable regulation under the licensing standard of public convenience and necessity is neither a violation of the First Amendment nor is it censorship within the meaning of Section 326 of the Communications Act, 47 U.S.C. 326. In another radio licensing case, *Lafayette Radio Electronics Corp. v. Federal Communications Commission,* 345 F. 2d 278 (2d Cir., 1965), the court there upheld the Commission's restrictions on the permissible nature of radio transmissions using the Citizen's Band Radio Service *because of natural limitations in available frequencies.*

In preserving scarce frequency space the Commission through its licensing promoted the exercise of free speech, since if everyone were to broadcast no one could be heard. Commission reliance on *NBC* and *Lafayette* as authority for prior restraint of CATV carriage is misplaced, since CATV occupies no frequency space. Unlike the broadcast licensing rules, the non-duplication rules do not promote free speech and are unreasonable.

Carter Mountain Transmission Corp. v. Federal Communications Commission, 321 F. 2d 359 (D.C. Cir., 1963), *cert. denied,* 375 U.S. 951 (1963), upheld a denial of a radio license to a common carrier for microwave service to a CATV system. The court there side-stepped the First Amendment question and held that this was a "licensing" procedure and not regulation of CATV. Moreover, the court pointed out that the CATV system was not a party to the case and neither its rights nor those of its subscribers were before the court. See also *Idaho Microwave, Inc. v. Federal Communications Commission,* 352 F. 2d 729 (D.C. Cir., 1965) where the CATV system was before the court as intervenor in the licensing of radio microwave transmission to a CATV system. There the court met First Amendment objections by explaining that it was concerned with "licensing" of microwave radio and not regulation of CATV or its rights to receive and distribute.

Thus, while under the accepted system of radio licensing, applicants have been denied a license for a radio station without impairment of First-Amendment freedom, there is no precedent supporting FCC's proscription on distribution of communications over closed-circuit cable facilities for which no federal license is required. And the FCC cannot lawfully condition the public's guaranteed access to common carrier services upon relinquishment of the constitutional right to distribute or receive free of governmental restraint.

Although the First Amendment argument was raised before this Court in *Southwestern Cable Co. v. United States,*

378 F. 2d 118 (9th Cir. 1967), *cert. granted,* 389 U.S. 911 (1967), it was not passed upon by the Court, and since that case did not involve non-duplication the argument was not reasserted in the Supreme Court.

"Congress has from the first emphatically forbidden the [Federal Communications] Commission to exercise any power of censorship over radio communications." *Farmers' Union v. WDAY,* 360 U.S. 525, 529 (1958). Section 326 of the Communications Act (47 U.S.C. 326), which *limits* the jurisdiction and authority of the administrative agency, reads in full as follows:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Without equivocation, therefore, the Congress has prescribed that the FCC shall promulgate no regulation or *condition* which may be understood, construed or used to infringe upon or interfere with the right of free speech, nor shall the Commission be empowered to take any action constituting censorship over radio communications or over "*signals transmitted by any radio station.*"

Here the Commission is repressing maximum distribution of communications made possible by technical advances. Petitioner has sought to demonstrate that its operation and distribution are not harmful to local television. Under these circumstances there is no reasonable protection of the public interest which warrants a restriction on petitioner's First

Amendment rights to freely distribute available television signals. Accordingly, the Commission's non-duplication rule and its proscriptive order halting a substantial part of petitioner's distribution without reference to any reasonable public interest is an unlawful restriction of the freedom of speech in violation of the First Amendment.

IV.

Failure to Provide for an Evidentiary Hearing in Modifying Petitioner's Business Is in Violation of the Due Process Clause and Pertinent Statutes.

The Federal Communications Commission does not purport to license CATV, but it assumes a greater restrictive and discriminatory control over CATV than exercised over any other communications medium. The Commission's CATV rules are admittedly protective of the preferred broadcaster, restrictive of free competition, and deny minimum safeguards of a fair hearing as required by the Fifth Amendment, the Administrative Procedure Act, the Communications Act of 1934, and the Commission's own rules for licensing, as guaranteed to all other communications media over which the Commission exercises regulatory control.

Petitioner's affiliate and intervenor here, TelePrompTer Transmission of Kansas, originally instigated these proceedings in 1965 for modification of its existing license to add radio FM signals to its service to the Great Falls CATV system. No hearing was sought at that time. In 1965 petitioner was not subject to direct FCC regulatory control. Upon promulgation of the *Second Report and Order* in 1966 petitioner intervened in the proceeding also seeking waiver of the non-duplication rules. Again no hearing was asked. However,

petitioner and intervenor had no forewarning that on a waiver petition the Commission would issue a proscriptive order compelling compliance within thirty days of issuance, foreclosing a substantial part of petitioner's service and causing almost certain destruction of its business. Nor did petitioner know that the Commission would reject out of hand uncontroverted, verified, factual allegations of destruction of its business contained in its pleadings and make unsupported findings in conflict with the allegations.[26] As a recourse, petitioner could have petitioned the Commission to reconsider its order and at that time sought a hearing. However, the Commission in other such cases has denied any relief during the pendency of the motion for reconsideration, forestalled the motion for as much as a year precluding interim relief in appeal, and then summarily reaffirmed its prior denial. In view of this Commission policy, petitioner has instead moved in this Court. To have sought a hearing would have been idle since the Commission has granted none in similar circumstances. Petitioner's failure to have sought a hearing should not foreclose its constitutional rights of due process in the taking and destroying of its business. Constitutional rights and due process are not to be so easily foreclosed. Moreover, since the rules fail to provide for hearing by right, petitioner cannot be said to have waived a right which the rules withheld.

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[26] The *First Report and Order* concludes that non-duplication "need impose no substantial burden on the ordinary CATV operator or his subscribers," 38 FCC at 714, para. 79, and should the rules prove unduly burdensome, "special action or waiver can be obtained upon an appropriate showing." *Id.* at 715, para. 82. The promised relief was denied here.

A. The Issuance of a Summary Order by an Administrative Agency Threatening Property Rights is a Denial of Due Process in Violation of the Fifth Amendment.

In the absence of a hearing, the issuance of a proscriptive order halting a substantial part of petitioner's business is a deprivation of property without due process of law in violation of the Fifth Amendment. When administrative agencies make binding determinations affecting the legal rights of individuals, "it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche,* 363 U.S. 420 at 442 (1960).

Modification of a certificate of convenience without hearing raises due process implications. *CAB v. Delta Air Lines,* 367 U.S. 316, 330 (1961), citing *Seatrain Lines v. United States,* 64 F. Supp. 156 at 161 (D. Del. 1946), affirmed 329 U.S. 424 (1947). *Seatrain* held that the ICC could not alter or cancel an original certificate given to a water carrier. The lower court had held the Commission's order would deprive Seatrain of property without due process of law in violation of the Fifth Amendment, 64 F. Supp. 156 at 161. In affirming the Supreme Court noted that *Seatrain* had been conferred "grandfather" rights, as here, and in reliance had expended large sums in its business, which the order would have threatened.

In *Superior Oil Company v. F. P. C.,* 322 F. 2d 601 (9th Cir. 1963), *cert. denied,* 377 U.S. 922 (1964), this Court examined due process issues concerning a denial of hearing in an administrative proceeding and observed that in *United States v. Storer Broadcasting Co.,* 351 U.S. 192 (1956) due process was not raised. The Court held that due process

required governmental agencies in adjudications to observe the traditional judicial processes, citing *Hannah v. Larche, supra.*

More recently in *Southwestern Cable Co. v. United States,* 378 F. 2d 118 (9th Cir. 1967), *cert. granted,* 389 U.S. 911 (1967), Judge Ely in his concurring opinion reasoned that the petitioner had relied upon the Commission's previous disavowal of jurisdiction over CATV in investing substantial sums of money. The Commission's proscriptive order, if enforced, would adversely affect, if not destroy, the petitioner's investments. In light of this, Judge Ely stated that "the Commission trespassed upon constitutional safeguards against the confiscation of property." Here, the Commission's order is not merely a freeze or a maintenance of the *status quo* as it was in *Southwestern,* but it threatens destruction of petitioner's entire business.

Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F. 2d 18 (D.C. Cir. 1949) held that a regulatory agency could not create a special class of irregular carrier by granting "letters of registration" with the right to revoke it at any time rather than a certificate of public convenience, in an attempt to circumvent a hearing on revocation or alteration of rights. The court explained:

> The controlling practicality, in our view, is that the suspension would destroy property, not a license property but investment and business property. The Government cannot make a business dependent upon a permit and make an otherwise unconstitutional requirement a condition to the permit. (177 F. 2d at 20.)

Here the same device has been employed against the petitioner and other CATV operators who are not license holders. Yet,

the Commission, in its "special regulatory control" over CATV business, seeks to alter and destroy petitioner's business by proscriptive order without permitting the elementary safeguards of due process as provided by the Fifth Amendment.

Gonzales v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964), dealt with due process aspects in summary suspension of the privilege of contracting with the government. In reversing the agency's action, the court explained that there was no right to contract with the government, but that the suspension of the privilege involved severe *economic injury.* Such circumstances called for application of basic principles of fairness and *due process.* In applying these principles, the court offered these guidelines: How was the individual to be hurt? What governmental interest was to be protected? How would the governmental interest be affected, if at all, by extending procedural safeguards to cover the challenged action?

Applying these principles to the instant case: petitioner is faced with destruction of its entire investment; the admitted governmental interest is protection of local broadcasting which has failed to demonstrate or even allege harm; as to the extending of procedural safeguards, the government has no business broadening its jurisdiction over a new class to convey new rights to a favored, vested class, when it cannot guarantee the ordinary minimum safeguards of due process and fair play.[27]

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[27] The Commission claims that it cannot guarantee a hearing in waiver petitions since hearings for the 1800 systems would impede the orderly working processes of the Commission. This argument is somewhat spurious in light of Rule 74.1107 (a), which requires an evidentiary hearing for new service in the top 100 markets on the bear objection by a local station. Before commencement of the new service, there must be an affirmative showing by the CATV system

(continued)

In its summary action and conclusionary findings the Commission has demonstrated a callous disregard of fair play and due process. In its failure to provide for a hearing it has barred consideration of the harm likely to be suffered. It has stuck steadfastly to its general preconceptions favoring television by eliminating competition whether or not the competition has any decided impact on the preferred television, and it has ignored the factor of fair play in the issuance of its proscriptive order. The Commission action has threatened the property and investments of petitioner's six year business, established in reliance upon the Commission's licensing of common carrier microwave service to furnish undiluted programming to petitioner's business, and incurred in the period the Commission steadfastly maintained it had no jurisdiction over CATV. The Commission's rules in failing to provide for hearing in the issuance of proscriptive orders threatening destruction and economic injury are in violation of due process guarantees of the Fifth Amendment.

B. Pertinent Statutes and Regulations Require a Hearing Prior to Modification or Revocation of an Existing Business.

The conduct and requirements for adjudication and rule making by government agencies are subject to the provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* The Act

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27 (continued)

that its proposed service would not adversely affect local TV. Mere hearing delay can break the back of a new operator. Thus, the Commission compels a hearing when it will serve broadcast interests, and denies a hearing where it will also serve broadcast interests. Due process and the orderly functioning of the Commission are mere incidental considerations.

provides that "adjudication" shall be determined on the record after opportunity for agency hearing (5 U.S.C. 554) with the full safeguards of an impartial hearing examiner, the submission of evidence, right to subpoena witnesses, presentation of documentary evidence, transcript of record, preparation of findings and decisions (5 U.S.C. 556 and 557).

The Communications Act of 1934, 47 U.S.C. 151 *et seq.*, contains similar safeguards for administrative hearings affecting the rights of parties. The Act provides for a full evidentiary hearing for application for license where there exists a substantial and material issue of fact, 47 U.S.C. 309(e) and for full hearing for suspension of an existing license, 47 U.S.C. 303(m)(2). Before revoking a license or permit, the Commission must serve a show cause order and allow a party a full hearing, where the *burden of proof is upon the Commission,* 47 U.S.C. 312(c) and (d). Moreover, even a modification of license or construction permit entitles a party to full evidentiary hearing with the burden of proof placed upon the Commission, 47 U.S.C. 316. See *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316 (1961), concerning a modification of a certificate of convenience in violation of Section 401(g) of the Federal Aviation Act of 1958, 49 U.S.C. 1371(g).

In implementing the Communications Act and the requirements of the Administrative Procedure Act,the Commission's rules similarly provide for hearing: on the suspension of an operator license, 47 C.F.R. 1.85; on the modification of a radio license, 47 C.F.R. 1.87; and on revocation or in cease and desist proceedings, 47 C.F.R. 1.91. Without such minimum and traditional safeguards, individuals have no protection against arbitrary, capricious, or erroneous rulings and orders by quasi-judicial and administrative agencies.

Turning to the rules of conduct and operation pertaining to CATV, the Commission has initially drafted its regulations with the presumption or taint that CATV operation is "unfair" and adverse to the "public interest." *First Report and Order,* 38 F.C.C. 683, 713 (1965).

Sections 21.712 and 74.1103 require all CATV systems to carry local television station signals, and upon the request of the local station, black-out signals that duplicate local programs, Sections 21.712(g) and 74.1103(e). The rules permit a petition for waiver, Section 74.1109, but in acting on waiver petitions the Commission may summarily grant or deny the petition or specify other procedures, including oral argument or full evidentiary hearing, Section 74.1109(f). In short, under its new CATV rules, the Commission may treat the existing CATV system and its petition for waiver in any manner it chooses and subject it to any procedure it may arbitrarily select under the amorphous umbrella of "consistent with the public interest." Since it appears before the Commission with the taint that its operations are adverse to the public interest, the CATV system must overcome this presumption before gaining the relief sought, which, in consequence, shifts the burden of proof, contrary to the APA and the Communications Act. Thus far, the Commission has shown little inclination to listen to individual petitions and why its general rules should not apply in a particular circumstance.

Although the Commission did not initially license or otherwise authorize the existing operation of petitioner's CATV service, the Commission now seeks to exercise complete licensing authority over petitioner's business, while relegating it to "second class" business status. Without any statutory licensing standard for reasonable protection of market allocation of CATV, the Commission, by its new rules has created a special class of licensee. It has effectively placed CATV

operators under its vast powers and authority in dictating which, if any, services can continue to be furnished over cable facilities, yet at the same time, denying the traditional safeguards and protections guaranteed to all licensees.

The practice of creating a special class over which the administrative body seeks greater regulatory control was condemned in *Standard Airlines, Inc. v. Civil Aeronautics Board,* 177 F. 2d 18 (D.C. Cir. 1949). The same device is employed here where the Commission "confers" grandfather rights over an existing industry where previously it had held it had no jurisdiction; then attaches to it a tainted business category of unfair competition; and proceeds by its special regulatory edicts to destroy large portions of the industry, while denying any hearings or minimum safeguards allowed to all licensees and the favored groups protected by its new rules. See also this Court's opinion in *Southwestern Cable Co. v. United States,* 378 F. 2d 118 (9th Cir. 1967), *cert. granted,* 389 U.S. 911(1967), which held that the Commission's power to make rules was limited to its "licensing authority."

The Commission's order forcing petitioner to insure exclusivity within thirty days is proscriptive in nature and tantamount to a cease and desist order under Section 312 of the Act, 47 U.S.C. 312. Similar summary action by the Commission operating under the new CATV rules has recently been condemned and reversed by this Court in *Southwestern Cable Co. v. United States,* 378 F. 2d 118 (9th Cir., 1967), *cert. granted,* 389 U.S. 911 (1967). In that case the Commission ordered a freeze on the expansion of a CATV system carrying Los Angeles television stations into the San Diego area while it investigated the effect of such carriage. In its petition for review the CATV system challenged the Commission's authority to issue such an order and at the same time

broadly attacked the Commission's power and authority over CATV and the constitutional validity of its *Second Report and Order,* 2 F.C.C. 2d 725 (1966).

In response, the Commission contended that its action was not a cease and desist order under 47 U.S.C. 312, but was a grant of temporary relief under Section 74.1109(f), which, in turn, it claimed, was an exercise of its rule making authority under Sections 4(i) and 303(r) of the Communications Act, 47 U.S.C. 154(i) and 303(r). The Court rejected this argument pointing out that the order was prohibitory in nature and thus amounted to a cease and desist order, and that the Commission could not circumvent the safeguards of 47 U.S.C. 312 by misapplication of its rule making authority. In his careful opinion, Judge Barnes explained that "the method of regulation of broadcasting chosen by Congress was *licensing*" and "4(i) and 303(r) are limited to the scope of the Commission's *licensing authority.*" The Court concluded that as against a *non-licensee,* the Commission's only authority to issue proscriptive orders was limited to action under 47 U.S.C. 312, with the safeguards of a full adjudicatory hearing as provided in that section.

Here the Commission's action is even more proscriptive in nature than in *Southwestern,* since petitioner is ordered not just to maintain the *status quo,* but to cease and desist from operating an existing part of its business, maintained for over six years. As in *Southwestern, supra,* such an order must fail because it was issued without the minimum safeguards provided by Congress under Section 312.

The new CATV rules are in startling conflict with the requirements of the Administrative Procedure Act, the Communications Act, and the Commission's own rules in other areas of direct control and regulation. The CATV operations and the application of the new rules fall squarely within the problems

and procedures outlined in the Administrative Procedure Act. The Commission's order in the instant case represents "final disposition"[28] and affirmatively orders compliance as contained in 5 U.S.C. 551(6) and formulation of this order is an "adjudication" as defined in 5 U.S.C. 551(7).[29] Pursuant to 5 U.S.C. 554, petitioner is entitled to a full hearing.

The provisions of Section 9 of the Administrative Procedure Act, 5 U.S.C. 558, protect licensees of agencies against any "withdrawal, suspension, revocation, or annulment of any license" without a full evidentiary hearing. And Section 2(e) of the Administrative Procedure Act, 5 U.S.C. 551(8), defines "license," among other things, to include any "form of permission."[30]

Notwithstanding the statutory and regulatory requirements, as a matter of elementary fairness, it would seem that the Commission should give, at minimum, the same protections and safeguards to the CATV industry, over which it assumes inferential control, as it allows to the broadcasting industry, over which it has direct statutory licensing control.

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28 " '[O]rder' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." (5 U.S.C. 551(6)).

29 "[A]djudication" means agency process for the formulation of an order." (5 U.S.C. 551(7)).

30 " '[L]icense' includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission." (5 U.S.C. 151(8)) " 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license." (5 U.S.C. 551(9)).

Section 309 of the Communications Act of 1934, 47 U.S.C. 309, provides for certain standards in granting of applications for licenses. The initial standard by which all applications are to be judged is a finding by the Commission of whether a public interest, convenience, and necessity will be served by the grantings of such applications. Subsection (e) of 309 provides that when a "substantial and material question of fact is presented" or the Commission for any reason is unable to make the finding of public interest, the Commission shall formally designate the application for hearing in which all interested parties may participate. See *Ashbacker Radio Co. v. Federal Communications Commission,* 326 U.S. 327 (1945); *Folkways Broadcasting Co. v. Federal Communications Commission,* 375 F. 2d 299 (D.C. Cir. 1967). The same considerations, which require the Commission to examine substantial and material issues of fact in determining the public interest for the grant of licenses, also require an examination of substantial and material issues of fact in a waiver petition.

Petitioner's verified petition for waiver of Sections 21.712 and 74.1103 of the Commission's rules[31] contains substantial and material factual issues warranting a hearing.

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[31] Under the Commission's rule of practice, 47 C.F.R. 1.52, the attorney's signature "constitutes a certificate by him that he has read the document; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay." The waiver petition was not only signed by petitioner's attorney, but contained also a sworn affidavit of verification by the officer of petitioner most familiar with the facts and circumstances of the case.

At heart is petitioner's statement that program exclusivity will destroy its only marketable feature and cause the demise of the system. (Para. 15, of the FCC Order, R. p. 67). Additionally, petitioner alleged that there was no corresponding injury to local stations without providing program exclusivity. Despite the uncontroverted verified allegation, the Commission rejected petitioner's statement and concluded as a matter of fact disruption of CATV is minimized by its ruling. (Order, para. 16, R. p. 68). As to the absence of corresponding injury, the Commission ruled that "a broadcaster need not show specific injury." (Para. 16, R. p. 68). Here the broadcaster failed to show *any* injury.

Thus, the Commission has demonstrated that although it had provided for waiver of the rules and an evidentiary hearing in Section 74.1109, it did not intend in any case to vary from its factual, as well as legal, preconceptions contained in the *Second Report and Order.* Any attempts to show that these factual preconceptions did not conform to local conditions would not be tolerated. The entire basis for the exclusivity rules, the Commission explained, was the adverse impact that CATV might have on the growth of local television and the splintering or fractionalizing of its audience. Yet, the Commission, callously, if candidly, states that it is not concerned whether there is in fact an injury to the broadcaster.

Interstate Broadcasting Company v. Federal Communications Commission, 323 F. 2d 797 (D.C. Cir. 1963) reversed the Commission's action in denying an application for license without a hearing. The court held that, although under the "Storer doctrine" an applicant is not absolutely entitled to a hearing, in rejecting a hearing the Commission must make definite findings and adequately explain its conclusions and support them with specific findings of fact. The D.C. Circuit

cited its earlier opinions in *Television Corp. of Mich., Inc. v. Federal Communications Commission,* 294 F. 2d 730, 733 (D.C. Cir. 1961), where the court found a bare assertion by the Commission that its action was "clearly in the public interest," an inadequate explanation to support its order; and *Telanserphone, Inc. v. Federal Communications Commission,* 231 F. 2d 732, 735 (D.C. Cir. 1956), which reversed a Commission order because the conclusions were not adequately supported by a record for review. See also *American Trucking Association v. Federal Communications Commission,* 377 F. 2d 121 at 134 (D.C. Cir. 1967), *cert. denied,* 386 U.S. 943 (1967). The Commission's broad conclusions lack adequate factual support.

In *Civil Aeronautics Board v. Delta Air Lines,* 367 U.S. 316 (1961), the Supreme Court stressed that financial impact on an existing business was a critical issue for careful examination through a full evidentiary hearing. Similarly, *Folkways Broadcasting Co. v. Federal Communications Commission,* 375 F. 2d 299 (D.C. Cir. 1967), in reversing the denial of a hearing on a television application, held that economic impact and possible destruction of an existing station by a grant of a license required the Commission to conduct a hearing under 47 U.S.C. 309. Here also economic impact is a principal issue and the Commission has improperly failed to conduct a hearing before issuing its proscriptive order. If the Commission intended to make factual decisions adverse to the uncontroverted evidence in the pleadings, it was required to do so, only after an adjudicatory hearing and a ruling on the evidence presented.

For denial of petitioner's right to hearing, respondents rely principally on *United States v. Storer Broadcasting Co.,*

351 U.S. 192 (1956); *Federal Power Commission v. Texaco,* 377 U.S. 33 (1964); and *American Airlines, Inc. v. Civil Aeronautics Board,* 359 F. 2d 624 (D.C. Cir. 1966). This reliance is misplaced for none of these cases condoned proscriptive action against non-licensees in a waiver proceeding.

Here, the Commission has issued in a waiver procedure a proscriptive order against a non-licensee forecasting almost certain destruction of its existing business. The Commission's action and order exceeded its statutory and regulatory authority. Petitioner in its waiver petition is entitled to a hearing in the adjudication of its rights. *United States v. Storer Broadcasting Co., supra,* and *Federal Power Commission v. Texaco, supra.*

V.

The Non-Duplication Rules Are an Unreasonable and Arbitrary Restriction in Restraint of Trade Beyond the Legislative Purposes of the Communications Act.

Indisputably the Federal Communications Commission has broad regulatory power over matters within its subject jurisdiction. However, the administrative agency has no greater power than has been conferred by Congress. *Regents of the University System of Georgia v. Carroll,* 338 U.S. 586, 594 (1950); and the scope of this power is subject to judicial review, *Columbia Broadcasting System, Inc. v. United States,* 316 U.S. 407 (1942); *Stark v. Wickard,* 321 U.S. 288 (1944). Judicial review includes a determination of whether regulations promulgated by the agency are reasonably necessary and fairly appropriate for the legislative scheme. *American Trucking Associations, Inc. v. United States,* 344 U.S. 298 at 314-315

(1953). Although the court is not to supplant its judgment or discretion for that of the administrative agency, the regulations must bear a reasonable relation to the statutory purpose and must not be otherwise arbitrary. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 69-70 (1937).

The administrative agency has wide latitude in the formulation of its regulations, and the courts will not interfere except "where the remedy selected has no reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co. v. Federal Trade Commission,* 327 U.S. 608, 612-613 (1946). "Congress did not purport to transfer its legislative power to the unbounded discretion of the legislative body." *Federal Communications Commission v. Radio Corporation of America Communications, Inc.*, 346 U.S. 86, 90 (1953). The exercise must be rational and within the bounds expressed by the legislative standard. *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 166-169 (1962).

Here, it will be shown that the Commission's CATV rules are built upon erroneous premises, are protective of a favored class of licensee, unfairly and unreasonably restrain legitimate competition of CATV to broadcasters, and bear no reasonable relationship to the purposes sought to be achieved. They are arbitrary, unreasonable and unnecessary restrictions against a new communications medium in protection of a favored, vested class.

A. The Regulation of CATV Duplication to Confer a Competitive Advantage to Broadcasting Is an Unreasonable and Arbitrary Restraint on Competition.

In its *First Report and Order,* 38 F.C.C. 683 (1965), the Commission explains its fundamental statutory responsibilities and policy are: to make available to all the people of the United States television service (47 U.S.C. 151); to encourage the larger and effective use of radio and television frequencies (47 U.S.C. 303(g)); and to distribute licenses and make a fair and equitable distribution of radio service throughout the United States (47 U.S.C. 303(b)). 38 F.C.C. at 697, para. 40. In accordance with this responsibility, it has designed a national scheme of frequency allocation, which is set forth in 47 C.F.R. 73.603. *Ibid.*, para. 41.

CATV, the Commission explains, can aid in carrying out this Commission allocation policy, *Id.* at 699, para. 44, but it may upset the policy by failing to carry local stations, *Id.* at 702, para. 50, or it may compete with local broadcasting in upsetting regional exclusivity provisions in the local station's contracts with network programs by importation and duplication of local programs, *Id.* at 703, para. 52-53. From these observations, the Commission concludes: (1) that the failure to carry local stations is inconsistent with CATV's *supplementary* role and contrary to the public interest; (2) that its unequal footing with broadcasters renders it an *unfair method of competition;* and (3) that the requirements of non-duplication and local carriage are not inconsistent with CATV's supplemental role. *Id.* at 705-706, para. 57.

From these findings and conclusions, the Commission has determined: (1) that every station is entitled to carriage and non-duplication by CATV, *Id.* at 713, para. 76; (2) that local

carriage and non-duplication are required "in order to ameliorate the adverse impact of CATV competition upon local stations, existing and potential," *Id.* at 713, para. 77; and (3) that local carriage and non-duplication requirements "need impose no substantial burden on the ordinary CATV operator or his subscribers" and be imposed "without unduly burdening or obstructing the operations of CATV systems," *Id.* at 714-715, paras. 79 and 81. In the event they should prove unduly burdensome, the Commission promised special action or waiver upon an appropriate showing. *Id.* at 715, para. 82. These findings and conclusions are endorsed and reaffirmed in the *Second Report and Order,* 2 F.C.C. 2d 725 at 778, paras. 131-133 (1966).

In sum, the Commission has cast CATV in a "supplementary role" to television broadcasting, branded it as "unfair competition," and embarked upon an unprecedented course of economic restriction and program control to protect the favored broadcast licensee. Commissioner Loevinger dissented from this new role of economic regulation for the Commission, and suggested that "expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation." *Id.* 746 at 759.[32]

By initiating economic regulation over CATV, the Commission has acted in absolute conflict with its opinion in *CATV and TV Repeater Services,* 26 F.C.C. 403 (1959), where it held that economic regulation over CATV in favor of broadcasters was "absurd." *Id.* at 432:

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[32] The dissenting opinion is quoted in full, Appendix A, p. 10a.

> In essence, the broadcaster's position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any non-broadcast competitive enterprise, . . . as closed-circuit music and news services, closed-circuit theatre television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. *The logical absurdity of such a position requires no elaboration.* [Emphasis added.] (26 F.C.C. at 431).[33]

The interest of the Congress in maintaining free competition in the field of radio broadcasting is manifested in Section 314 of the Act, 47 U.S.C. 314, which prohibits those in the business of transmitting and receiving communications or signals by radio from any action which may substantially lessen competition or restrain commerce or unlawfully create a monopoly in any line of commerce. Section 313 of the Act, 47 U.S.C. 313, revokes the license of violators of the anti-trust laws.

The Communications Act regulates radio transmission principally in the interest of preserving rare spectrum space. This regulatory control marks the FCC and radio broadcasting from other regulatory agencies and their regulated industries. For instance, radio differs substantially from most transportation industries where competition under the controlling

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[33] For a more complete quotation from this opinion, see Appendix A, pp. 4a-9a.

statute has been deemed in certain circumstances to be adverse to the public interest. It is the principal function of the transportation agencies to set and control rates and to determine what degree of competition is necessary and desirable in the public interest, and who should operate and control various routes and services.

Regulation of radio differs from the Commission's control of common carrier service under Title II of the Act. 47 U.S.C. 201 *et seq.* Similar to agency regulation of common carrier transportation, the FCC fixes rates and decides the desirable extent of carrier competition. In contrast, the courts have repeatedly recognized that radio broadcasting, despite licensing, is an area of free competition. *Lorain Journal Co v. United States,* 342 U.S. 143 (1951); *Federal Communications Commission v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940); *Easton Publishing Co. v. Federal Communications Commission,* 175 F. 2d 344, 346 (D.C. Cir., 1949).

In *Federal Communications Commission v. Sanders Brothers Radio Station,* 309 U.S. 470 (1940), the Court underscored the competitive nature of broadcasting:

> Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.
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> . . . the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment and financial ability to make good use of the assigned channel.
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> . . . Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public. (Footnotes omitted) 309 U.S. at 474-475.

In *Carroll Broadcasting Co. v. Federal Communications Commission,* 258 F. 2d 440 (D.C. Cir., 1958), the court held that the doctrine of "free competition" was tempered only to the degree where it could be demonstrated, on the facts and after hearing, that such competition would result in harm to the public interest. But the court was careful to emphasize that the presumption is weighed heavily in favor of free competition and that the task of demonstrating injury to the public interest is "certainly a heavy burden." 258 F. 2d at 444.

The Commission's own rulings have held and reaffirmed the position that broadcasting is an area of free competition and that the FCC is powerless to consider the effects of the competitive impact occasioned by a new license. *Presque Isle*

Broadcasting Co., 8 F.C.C. 3, 9, 10 (1940). *Southeastern Enterprises (WCLE),* 22 F.C.C. 605, 614 (1957):

> If the protestant's allegations are true and the public is injured in this case, it must persuade Congress to modify the law and provide for protection against competition in such cases as the protestant's. Until Congress gives us the power to permit something less than free competition in the industry, we have no power to save either the public or the protestant from certain of competition's uncomfortable effects.

The Congressional intent to preserve competition in the radio field was underscored by unsuccessful efforts to amend section 307(d) of the Communications Act in the 80th Congress. Section 307, 47 U.S.C. 307, requires the distribution of licenses among the several states to "provide a fair, efficient, and equitable distribution of radio service." The proposed amendment would have added "giving effect in each instance to the needs and requirements thereof." Hearings before the Subcommittee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. (1947) demonstrated that the issue raised by the amendment was whether to remove broadcasting from the field of free competition, *Id.* at 40. The amendment failed.

In sum, the courts, the Commission, and the legislative history all uphold the principle that broadcasting is a field of free competition. The Commission's new CATV rules now limit this principle to free competition *among* broadcasters, but free *of* competition from any other medium. Such an overlacing is a corruption of the doctrine of free competition and entirely undermines the concept.

The Commission explains that CATV carriage of distant stations upsets regional exclusivity sales agreements between broadcasters and the networks. *First Report and Order,* 38 F.C.C. at 702, para. 50. The FCC's protection of these exclusivity agreements by restricting CATV competition is inconsistent with its finding in the *First Report and Order* that protection of copyright and copyright agreements are beyond the jurisdiction of the FCC. 39 F.C.C. at 740, para. 149. Additionally, it is inconsistent with the finding that the prohibition of rebroadcasting without permission under Section 325 of the Act, 47 U.S.C. 325, does not apply to CATV receipt and distribution of television signals. *Id.* at 704, para. 54, citing *CATV and TV Repeater Services,* 26 F.C.C. 403, 429-430 (1959).

The Commission's basic premise and rationale for CATV restrictive regulation is that CATV competition to broadcasters is "unfair." Despite the Commission's elaborate explanation of the economics of CATV operation and its advantageous competitive position, the Commission fails to explain under what precedent or rule of law such economic advantage takes on a tainted character of unfair competition. Nor does it explain why competition in itself has any unsavory or illegal aspects. The Commission is neither authorized nor competent to judge unfair competition. This function is designated to the Federal Trade Commission, 15 U.S.C. 45, which acts primarily to preserve competition – not to restrain it. To the extent that the Commission may consider antitrust violations or unfair trade practices in the grant or revocation of broadcast licenses,[34]

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[34] See *National Broadcasting Co. v. United States,* 319 U.S. 190, 223-224 (1943), holding that the Commission can consider and apply the antitrust laws in licensing.

it is bound by the FTC's standards and rules and the precedents of the courts. The FCC in launching a new regulatory scheme cannot create an independent body of law defining "unfair trade" practices.

In administering fair trade laws, the Federal Trade Commission refrains from regulating day-to-day business activity. It prosecutes and punishes offenders. In contrast, the FCC has constructed an entire system of economic regulation and seeks to impose daily operational rules and standards. Not only is the regulatory scheme unwise, but the premise of unfair competition is invalid. This Court held in *Cable Vision, Inc. v. KUTV, Inc.*, 335 F. 2d 348 (9th Cir., 1964), *cert. denied,* 379 U.S. 989 (1965), outside of possible copyright protection, broadcasters had no protectible interest against CATV competition.

Deference to the role of the FTC is made in Section 313 of the Communications Act, 47 U.S.C. 313, which directs the Commission upon a finding by the FTC to take certain punitive action against license holders. Findings of restraint of trade are left to the FTC, while the FCC acts upon this finding to withdraw the broadcast license.

The CATV rules are manifestly unreasonable and arbitrary where their foundation of unfair competition has no validity. They are likewise unreasonable and arbitrary when they relegate cable television to a role ancillary or supplemental to television broadcasting. It is certainly true that CATV in receiving broadcast signals off-the-air depends primarily upon broadcasting and in this sense supplements it. But the Commission has straight-jacketed CATV's future from its past. As a finding of scientific fact it is erroneous, since cable television (as the industry now prefers to be called) is fully capable of originating its own programs and sending

them independent of any broadcasting. As spectrum space is exhausted, cable television may open the door for unlimited, yet selective, television viewing.[35] Restricting and limiting its role to receive and distribute available television signals unfairly inhibits its growth to produce its own programs and materials, and denies the public of technological advance.

The regulations are also unreasonable and arbitrary in that they fail to achieve their announced purpose. The Commission explains that the CATV regulations are designed to promote local broadcasting, both existing and future. Additionally, the rules are to promote UHF development. First, that broadcasting is in need of any economic protection takes no small amount of tortured reasoning. The broadcast industry offers one of the largest returns on investment of any business in America.[36] It is the *only* "regulated" industry which under

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[35] In a recent article one of the Federal Communications Commissioners has pointed out that CATV has significant future potential to provide new communication services, such as printing of newspapers at home, shopping from home, and specialized teaching at home and by originating programming to meet special areas of interest. In this connection, he points out that CATV "might be a vigorous and useful check on the big telephone monopolies," but that it is unlikely that its future will "be as splendid as all this . . . Its fate is now being determined in a grim political and economic struggle with the giant interests whose prosperity and power it has challenged – the broadcast industry and the telephone companies." Nicholas Johnson, *CATV: Promise and Peril.* Saturday Review, November 11, 1967, p. 87.

[36] Figures released by the FCC in Public Notice 5317, dated August 25, 1967, entitled "TV Broadcast Financial Data – 1966," disclose that the broadcasters reported revenues of $2.2 billion with 87% of VHF stations showing profitable operations. Of these 116 stations reported profits in excess of $1 million.

these rules gets economic protection without any corresponding economic restraint — no ceiling or limitation is placed on its rate of return or investment. In contrast, common carrier by wire or radiocast for monopoly services must charge just and reasonable rates as determined by the Commission. 47 U.S.C. 201(b).

Broadcast protection against competition is an unreasonable goal. The Commission began its regulation to preserve the spectrum space and distribute it fairly among responsible applicants. After a vested interest of broadcasters has developed, the Commission now deems its function has been enlarged to keep these interests free of competition and to foster a new competitive industry and communications medium into an "ancillary," supporting service. Although the Commission's role is cast in the frame of "protecting the public interest," in practice it translates to "protecting broadcast interests" in maintaining an unchecked monopoly.

Secondly, the rules do not promote local broadcasting and particularly, they do not promote UHF development. Their major thrust is to protection of the television stations in the 100 major markets, the healthiest and most economically rewarding stations. 47 C.F.R. 73.636. The rules do little to aid local broadcasting since local broadcasting is not otherwise promoted by Commission practice, and as practical effect does not exist. Approximately 90% of "local broadcasting" is made up of packaged network shows and national sporting events. The limping development of UHF is not due to VHF competition, but the Commission's own relegation of UHF to less desirable band frequencies and the Commission's failure to aid UHF stations in obtaining network affiliation. Even

again the group that arrived first gets the Commission imprimatur and protection.[37]

In short, the CATV rules protect big television and the major networks, long recipient of Commission protection and free of Commission regulation. In practical effect, regardless of validity, the rules have bought time for the networks in the period where their private copyright litigation was winding its way through the courts.[38] If, of course, broadcast materials are subject to copyright then the Commission's major premise of unfair competitive advantage by CATV access to "free" materials is invalid, since private copyright will afford the necessary protection. On the other hand, if broadcasters are not entitled to private copyright protection, receipt and distribution of the broadcast materials cannot be labeled "unfair."

Administration of the CATV rules presents still another aspect of their tendency to unreasonable and arbitrary misapplication. The instant case is one in point. Here, petitioner has in its verified pleadings asserted that non-duplication will cause its demise. No contrary evidence – indeed, no contrary allegations – were made. The uncontroverted fact of the system's demise was ignored by the Commission in its opinion and order.

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[37] For a discussion of the failures of UHF development see Network Broadcasting, Report of the Committee on Interstate and Foreign Commerce, H. R. Rep. No. 1297, 85th Cong., 2d Sess. 226 (1958).

[38] The copyright case, *Fortnightly Corp. v. United Artists Television, Inc.*, 377 F. 2d 872 (2d Cir., 1967), *cert. granted*, 389 U.S. 969 (1967), is now pending before the Supreme Court, No. 618, and will be argued March 12, 1968.

In the *First Report and Order,* the Commission had concluded that non-duplication "need impose no substantial burden on the ordinary CATV operator or his subscribers," 38 F.C.C. at 714, para. 78, and where it did prove unduly burdensome, the Commission promised special action or waiver upon an appropriate showing. *Id.* at 715, para. 82. Here, the only statement pending before the Commission is that petitioner will be destroyed. This allegation is not challenged and the Commission makes no contrary finding. It simply ignored the fact. This practice is typical in the Commission's administration of its new rules. It is even more alarming in light of the fact the Commission did not inquire as to whether there was any corresponding harm on the part of the local stations necessitating destruction of the CATV system. Such callous administration of the rules is unreasonable and arbitrary.

In sum, the CATV non-duplication rules are an unreasonable and arbitrary restraint on legitimate CATV competition in that (1) they are inconsistent with the doctrine of free competition in the field of broadcasting as enunciated in the Act and its legislative history, the precedents of the courts, and the rulings of the Commission; (2) they are based upon erroneous premises of unfair competition and a supplemental role for CATV; (3) they fail to achieve their stated objective of protecting local and UHF broadcasting; (4) they are inconsistent with the findings that the Commission has no jurisdiction over copyright matters or rebroadcasting by CATV under Section 325 of the Act; (5) they impose unprecedented, economic regulation over non-licensees in favor of a vested class of licensees without any corresponding restraint; and (6) they are administered without due regard to the economic need and the corresponding economic damage in particular instances. Accordingly, the rules should be overturned.

B. Enforcement of the Non-Duplication Rules at the Option of the Local Broadcaster Is an Unreasonable and Arbitrary Restriction and Delegation of Authority.

Under the Commission's CATV rules, exclusivity is not automatic but must be invoked, oddly not by the Commission's action, but by action and request of the competitor television station under sections 21.712(g) and 74.1103(f). Section 74.1103(f) provides:

> Where a station is entitled to program exclusivity the CATV system shall, *upon the request of the station licensee or permittee,* refrain from duplicating any program broadcast by such station. [Emphasis added].

This rule places in the hands of the preferred TV broadcaster the power to invoke the rules at will. It delegates to the local station a degree of regulation and control over communications – matters which Congress has exclusively delegated to the Commission. The practical effect of this delegation of authority is to deliver CATV systems over to the hands of the local broadcasters. Where non-duplication protection threatens destruction of the CATV system, local broadcasters have life and death power over the system. Such economic leverage has naturally led to wide abuse. For example a station can extract a tribute from the CATV system in exchange for not invoking the rule. In other instances, the threat of invoking the non-duplication rules has kept a potential CATV system from starting its business. In one instance a local station "obtained" a minority stock interest in the CATV system in exchange for dismissing its objections to carriage of distant signals.

Astonishingly, the Commission approved this extortion. *United Transmission, Inc.*, 10 F.C.C. 2d 118 (1967). In other cases local television stations have conspired to gain the CATV franchise for themselves by manipulation of the non-duplication rule together with the threat of objection to new service by independent CATV operators. The CATV rules encourage restraint of trade and provide a means for gaining a monopoly in the same line of commerce.

If local carriage and non-duplication are desirable ends, and violations of these provisions are unfair, then they should be applied by the Commission fairly and evenly across the board. Discretion and control should not be placed in the hands of the competitor industry to administer at will or extract a penalty or tribute for not invoking them. This leverage in the hands of the preferred broadcaster does not achieve economic parity with CATV, but gives to the broadcaster the means for economic abuse and tyranny. Yet the Commission, cognizant of local deals and exchanges, encourages a local solution.[39] Manifestly, such an uneven administration of the rules at the whim of the competitor industry is an unreasonable and arbitrary delegation of authority leading to abuse and corruption of the rules themselves.

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[39] *First Report and Order*, 39 F.C.C. 683 at 737, para. 148 (1965).

CONCLUSION

For the foregoing reasons, petitioner prays that the Court enjoin, set aside, vacate and declare unlawful the order of the Federal Communications Commission as contained in its Memorandum Opinion and Order of November 17, 1967; that it declare unlawful the CATV rules promulgated by the Federal Communications Commission as beyond the jurisdiction of the Commission; that it declare unlawful the CATV non-duplication rules, 47 C.F.R. 21.712 and 74.1103, as a prior restraint in the receipt and distribution of information and an unreasonable and arbitrary regulation of a non-licensee industry; or in the alternative that it declare that petitioner is entitled to a full evidentiary hearing on its petition for waiver; and that it remand the matter to the Commission with instructions to conduct an evidentiary hearing consistent with the Court's opinion.

Respectfully submitted,

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March 8, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Alan Raywid